VOL. 38 (2d Series) DECEMBER 8, 1972 No. 2

FEDERAL COMMUNICATIONS COMMISSION REPORTS
(38 F.C.C. 2d)

Decisions, Reports, Public Notices, and Other Documents of the Federal Communications Commission of the United States

VOLUME 38 (2d Series)

Pages 95 to 212

Reported by the Commission

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Washington, D.C. 20402 - on a subscription basis

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F.C.C. 72R-336

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of AZALEA CORP., MOBILE, ALA.	Docket No. 17555 File No. BP-17340
W.G.O.K., INC. (WGOK), MOBILE, ALA.	Docket No. 17556 File No. BP-17398
PEOPLE'S PROGRESSIVE RADIO, INC., MOBILE, ALA.	Docket No. 17557 File No. BP-17477
MOBILE BROADCAST SERVICE, INC., MOBILE, ALA. For Construction Permits	Docket No. 17558 File No. BP-17478

MEMORANDUM OPINION AND ORDER

(Adopted November 21, 1972; Released November 24, 1972)

BY THE REVIEW BOARD:

1. Each of the mutually exclusive applicants in this standard broadcast proceeding seeks an authorization to operate on the frequency 960 kHz, 1 kw, daytime only, at Mobile, Alabama. Azalea Corporation (Azalea), People's Progressive Radio, Inc. (People's), and Mobile Broadcast Service Inc., (MBS) request authority to construct a new Class III station, whereas W.G.O.K., Inc., licensee of Class II standard broadcast Station WGOK, seeks to modify the present facilities of its daytime-only Mobile station. By Memorandum Opinion and Order, FCC 67-756, 32 FR 10685, 10 RR 2d 717, published July 20, 1967, the Commission designated the applications for consolidated hearing on various issues, including *Suburban* issues against Azalea and MBS. The proceeding is pending before the Review Board on exceptions directed to the Administrative Law Judge's Initial Decision, FCC 69D-25, released April 22, 1969, wherein he concluded that, with the exception of Azalea, which had failed to sustain its burden under the *Suburban* issue, the other applicants had demonstrated their requisite qualifications, and recommended a grant of the MBS application under the standard comparative issue. In reaching this result, the Presiding Judge resolved the *Suburban* issue in favor of the preferred applicant, and extensive exceptions have been addressed by the parties to this and other determinations of the Presiding Judge. Following oral argument before the Review Board on February 17, 1970, the issuance of the Board's final Decision in this proceeding was stayed by the Commission during the pendency of the *Primer* inquiry proceeding in Docket No. 18774. See *Interim Procedure Relating to Submission of Community Survey Showings in Connection with Radio and Television Applications*, 22 FCC 2d 421, 18 RR 2d 1923 (1970). On February 23, 1971, the Commission released its *Report and Order* adopt-

ing the *Primer on Ascertainment Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507, and stated in paragraph 79 thereof that: "[A]pplicants in pending hearing cases may amend their applications if deemed necessary in view of our action here, within ninety (90) days of the release of the Report and Order, or such further time as the presiding tribunal may allow for cause shown". Presently before the Review Board for consideration are two amendments, filed on May 24, 1971 and February 2, 1972, respectively, by Azalea and MBS, which set forth additional information regarding the applicants' ascertainment of community needs. Also before the Board are two petitions to dismiss applications and eight separate petitions to reopen the record, which were filed by WGOK, Peoples and MBS in order to disclose various events occurring since the close of the record in this proceeding on December 10, 1968.[1]

THE SUBURBAN AMENDMENTS

2. Within the period specified by the Commission in paragraph 79 of the *Report and Order* and in response to a disqualifying *Suburban* issue, Azalea tendered a *Suburban* amendment with the Secretary of the Commission.[2] In the amendment, Azalea identifies the two reference sources it consulted to ascertain the demographic characteristics of the Mobile area and describes Mobile and its environs in terms of population, educational facilities, government and labor force. The number of churches and hospitals in the area, as well as the circulation of the area's major newspaper, is also included in this material. The applicant further reports that it conducted a leadership survey and a telephone survey of the general public to ascertain the community problems of Mobile and its environs. Approximately 46 of the area's community leaders, who are identified by name and organization, were allegedly interviewed by Azalea and a brief enumeration of the thirteen community problems reportedly culled from these interviews is set forth. Also included is a listing of the area's problems, derived from the 204 households that responded in Azalea's telephone sampling, and broken down into the following five general categories: (1) general social factors; (2) ecology and quality of life; (3) interpersonal relations; (4) personal economic factors; and (5) drug abuse. Azalea does not intend to change the proposed programming which it has described at the hearing, namely, programs directed to the needs of the Black community in Mobile; rather, the applicant submits that the information elicited from its most recent surveys will be used "as a guide to the content of the programming heretofore proposed".

3. Following appeals to the Review Board and the Commission concerning the submission of further *Suburban* showings in this proceed-

[1] A list of the numerous pleadings now before us is contained in the attached Appendix. As indicated, the last pleading was not filed until November 13, 1972.

[2] By Order, FCC 71R–299, released October 6, 1971, the Review Board's consideration of the amendment was held in abeyance since the amendment had not been accompanied by proof of service upon the parties to this proceeding as required by Rule 1.296. Service was effected on October 21, 1971, and comments regarding the amendment were filed on November 1, 1971 and November 19, 1971, by the Broadcast Bureau and MBS, respectively.

ing,[3] a telephone survey of Mobile area residents was conducted in mid-October of 1971, by a temporary employee who worked under the direction of two MBS stockholders. In all, 110 residents of Mobile and the surrounding area were interviewed and four problems (schools and school busing, pollution, crime, and jobs and industrial development) are listed as the most frequently mentioned problems facing the immediate area. A similar grouping is also included for the most important state-wide problems in the respondents' view. From November, 1971 to January, 1972, three MBS stockholders conducted a survey of Mobile area leaders.[4] Seventeen Blacks and six women are among the 51 leaders whom MBS named as participants and identified by occupation or affiliation. Among the eleven significant local problems identified in this leadership survey are unemployment, air and water pollution, lack of governmental leadership, and failure of public education. A listing of the four problems of state-wide concern and the programming suggestions mentioned by the community leaders are also set forth in the MBS amendment. According to MBS, the community needs and problems ascertained in its latest surveys will be met in the daily, one-hour public affairs program which is encompassed in the programming proposal the applicant presented at the hearing. Further, the applicant plans to conduct monthly public opinion surveys and to present the results of these surveys, along with interested speakers, as one of the features within MBS's already proposed six-hour Sunday afternoon music and news program.

4. In its responsive pleadings, the Broadcast Bureau submits that the proffered amendments do not satisfactorily demonstrate that either Azalea or MBS has met its *Suburban* issue. Specifically, the Bureau points out that neither the interviewer nor the date of Azalea's interviews are set forth; that only one Black community leader was contacted; that the random basis of the general public survey is not shown; and that Azalea has proposed no new programming to satisfy the community needs and problems ascertained in the aforenoted sur-

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[3] Although the Review Board was of the opinion that the Commission's statement in paragraph 79 of the *Report and Order* would permit all of the applicants in this proceeding to revise their *Suburban* showings, the matter, raising novel questions of first impression affecting a substantial number of other adjudicatory proceedings, was certified to the Commission in order to promote the orderly and efficient administration of Commission business. See 29 FCC 2d 453, 21 RR 2d 1201 (1971). By Order, FCC 71-589, 30 FCC 2d 1, released June 9, 1971, the Commission indicated that, consonant with its Public Notice of June 4, 1971 (*Amendments by Applicants in Pending Hearing Cases to Comply with the Primer on Ascertainment of Community Problems*, 30 FCC 2d 136, 21 RR 2d 1746), *Suburban* amendments by the applicants herein should be accepted and consideration thereof should be limited to the resolution of the disqualifying issue. On June 11, 1971, MBS requested the Commission to reconsider its action, challenging the propriety of allowing Azalea to amend its *Suburban* showing and seeking to ascertain whether it was required to resurvey the community's needs and interests, notwithstanding the Presiding Judge's conclusion that MBS had met the *Suburban* standards in force when its application was filed. On September 7, 1971, the Commission released its Memorandum Opinion and Order denying the MBS petition. 31 FCC 2d 561, 22 RR 2d 909. In its Order, the Commission waived Rule 1.106 and considered the petition on its merits since MBS had not been afforded a prior opportunity to argue directly on the matters set forth in the Public Notice of June 4, 1971; restated its determination that "good cause exists for the submission of an amended showing in all pending hearing cases whether or not the hearing record has been closed and without regard to an applicant's prior efforts in this respect"; and concluded that "it would be wholly inappropriate, in the absence of a detailed examination of the record which is not now before us to decide whether or not a further [*Suburban*] showing is required" from MBS.

[4] Reportedly, a detailed questionnaire was used in this survey and the questionnaire forms reflecting the specific contacts have been retained by MBS.

vey.[5] With respect to the MBS amendment, the Bureau contends that the amendment is unreasonably late and not accompanied by a valid showing of good cause for its acceptance. In addition, the Bureau urges that the MBS amendment does not fully comport with the requirements of the *Primer* and lists two alleged deficiencies to illustrate the amendment's inadequacies.[6]

5. The Review Board believes that the *Suburban* amendments of both Azalea and MBS should be accepted and considered on their merits. The Azalea amendment was tendered within the prescribed period and is otherwise consistent with the Commission's Order of June 9, 1971. MBS did not file its amendment until February 3, 1972; however, the question of measuring MBS's *Suburban* showing against the contemporary Commission standards set forth in the *Primer* was not finally resolved until September of 1971, and the applicant's explanation of the less than one-month delay in the subsequent revision of its *Suburban* showing, *i.e.*, the relocation of its principal stockholders, the necessary reliance upon less experience, resident stockholders, and the intervening holiday seasons, persuade the Board that good cause exists for the acceptance of the instant amendment. *Cf. Middle Georgia Broadcasting Co.*, 30 FCC 2d 796, 22 RR 2d 524 (1971); *City of New York Municipal Broadcasting System (WNYC)*, 29 FCC 2d 244, 21 RR 2d 1050 (1971).

6. Turning to the substance of the amendments, the Review Board finds that neither applicant appears to have complied fully with the *Primer* requirements. According to the demographic information supplied by Azalea, the 1970 Black population of Mobile and Mobile County was over 35% and 32% of their respective populations of 190,000 and 317,000 persons; however, only one Black community leader was apparently consulted by the applicant. Rather than indulge in a "numbers game" with respect to its community survey requirements, the Commission regularly looks to whether the applicant's survey is representative of the significant segments that comprise the community to be served. See *Primer*, Q. & A. 14; and *RKO General, Inc.*, 33 FCC 2d 664, 667, 23 RR 2d 930, 934 (1972). A single contact with Mobile's Black leadership, however, can hardly be characterized as an adequate sampling of that segment of the community to which Azalea plans to specifically orient its programming. See *North Texas Enterprises, Incorporated*, FCC 72-197, 37 FR 5316, published January 12, 1972. In addition, Azalea has supplied virtually none of the basic information required by the *Primer* as to how the subject surveys were designed and conducted. *E.g.*, *Primer*, Q. & A. 11(c), 11(b), 13(b), and 15. Other shortcomings in Azalea's *Suburban* showing include the failure to relate the thirteen broad program categories allegedly derived from its leadership survey, such as "crime," "pov-

[5] MBS argues with the Bureau's evaluation of the Azalea amendment and maintains that the new material cannot be considered by the Board, unless and until the record is reopened and the proceeding remanded in order to afford the parties an opportunity to cross-examine with respect thereto.

[6] In response to the specific deficiencies noted by the Bureau, MBS has supplied further information concerning its ascertainment efforts, which it requests the Review Board to consider. Since the material is supplemental in nature and since MBS's request is not opposed, the Board has considered the applicant's latest *Suburban* showing as supplemented. See paragraph 3, *supra*.

erty", and "civil rights", to the specific needs and interests of Mobile, and the failure to particularize what programs are designed to meet the specific problems ascertained. See *Primer*, Q. & A. 29; *Frank M. Cowles*, FCC 72R–267, 25 RR 2d 475; and *William R. Gaston*, 35 FCC 2d 624, 24 RR 2d 779 (1972); *Broadcasting Service of Carolina, Inc.*, 30 FCC 2d 311, 22 RR 2d 289 (1971). In the same vein, the *Suburban* showing tendered by MBS suffers from several key deficiencies. MBS has not submitted a full profile of its community, indicating (in addition to the community's racial composition) Mobile's economic and governmental activities, its public service organizations and any other factor or activities that make the community distinctive. Without such a community analysis, it is not clear that the various groups contacted by the applicant constitute a representative cross-section of the specified community. See *Guy S. Erway*, FCC 72–879, 37 FR 22899, published October 26, 1972; *Harry D. Stephenson and Robert E. Stephenson*, 33 FCC 2d 749, 753–54, 23 RR 2d 760, 766 (1972); *North American Broadcasting Co., Inc.*, 30 FCC 2d 806, 22 RR 2d 508 (1971). Like Azalea, MBS has also failed to adequately correlate its proposed programming with any particular ascertained need. The applicant's statement that it will deal with all of the community problems discovered in its latest surveys in its one-hour public affairs program lacks the specificity called for by the Commission and this matter should be explored in an evidentiary hearing. See *Cosmos Broadcasting Corporation (WSFA–TV)*, 31 FCC 2d 200, 22 RR 2d 723 (1971); *Middle Georgia Broadcasting Co., supra*. In sum, both subject amendments lack the information required by the *Primer* which would enable the Review Board to conclude that each applicant has ascertained the community needs and interests of the area to be served by the proposed station and has designed programming in response to the community's ascertained needs as evaluated. In view of the foregoing, the Board believes that this proceeding must be remanded for further hearing under the *Suburban* issues and for preparation of a Supplemental Initial Decision resolving these issues.

THE PETITIONS TO REOPEN THE RECORD

7. Subsequent to the issuance of the Initial Decision in this proceeding, Peoples requested the Review Board to reopen the record and remand the proceeding under added issues concerning MBS's failure to report the imposition of a lien against its principals and the effect thereof upon the applicant's character and financial qualifications. According to petitioner, the State of Alabama Department of Industrial Relations filed the subject lien with the Mobile County Probate Court on August 28, 1969, against the realty of two MBS stockholders, Howard L. and E. Howard Smith. The lien, which arose from the Smith's failure to make the required state unemployment compensation payments for covered employees of Station WLPR–FM, totalled $177.87 ($104.88 in payments plus $72.99 for interest and penalty).[7]

[7] At that time, the Smiths, acting as Mobile Broadcast Service, were the licensee of Station WLPR–FM, Mobile, Alabama. On August 26, 1970, however, the Commission approved the voluntary assignment (BALH–1353) of the station from the Smiths to Sound Broadcast Corporation. By letter of September 2, 1970, counsel for MBS informed the Commission and the parties to this proceeding of the consummation of the approved sale.

It is the contention of Peoples that the lien should have been reported within the 30-day period prescribed by Rule 1.65 and that the existence of the lien raises a vital question as to the ability of the Smiths to fulfill their substantial commitments to the applicant.[8]

8. MBS opposes petitioner's request, disputing the decisional significance of the lien in light of Howard L. Smith's acquisition of his subscribed stock and E. Howard Smith's demonstrated ability to honor his financial commitments to MBS. See note 7, *supra*. Attached to MBS's pleading is an affidavit of Howard L. Smith, who states therein that in September of 1969, he was informed by the local director of the state unemployment office that the station's first two quarterly installments of the unemployment compensation payment, which contribution had theretofor been made on an annual basis, had matured. The affiant further states that although a check was drawn for the amount due and sent to the Alabama Department of Revenue, he was later informed by a representative of the county sheriff's office that the check should have been drawn payable to the Alabama Unemployment Compensation Agency and that another check for the amount claimed and a collection fee should be drawn payable to the Sheriff of Mobile County. As directed, Smith reportedly sent the required check to the sheriff's office.[9] Howard E. Smith also avers that during his conversation with the aforenoted officials, no mention was made of the existence of the lien and that he had no record or recollection of receiving, on or about September 18, 1969, a letter informing Station WLPR–FM of the imposition of the lien.

9. In reply, Peoples withdraws its requests for the addition of basic qualifications issues since it has no reason to disbelieve Howard E. Smith's disavowal of receipt of written notice concerning the imposition of the lien. However, petitioner reiterates its contention that the existence of the lien should have been reported pursuant to Rule 1.65 and renews its request that the non-disclosure be examined comparatively, contending that Smith's discussions with the local officials concerning the indebtedness and the facts concerning the transmittal of the written notice of the lien should be determined on the basis of an evidentiary record.[10]

10. The obligation in question arose from the Smiths' operation of Station WLPR–FM; however, the Review Board is not persuaded that the mere existence of the lien is reportable pursuant to Rule 1.65. See *Advanced Electronics*, FCC 65R–265, 5 RR 2d 980. Besides relevancy, the materiality of or significance of such an obligation must be demonstrated. See *Cosmopolitan Enterprises, Inc.*, 8 FCC 2d 876, 10 RR 2d 532 (1967). The Board is of the opinion that the lien

[8] A limited financial issue which, *inter alia*, concerned the ability of several stockholders, including the Smiths, to satisfy their subscription agreements and the ability of E. Howard Smith to finance his $10,000 loan to the applicant, was specified by the Commission. See Designation Order, *supra*. As noted, the Presiding Judge resolved the financial issue in MBS's favor, holding that Howard L. Smith has satisfied his stock subscription and that E. Howard Smith has sufficient net liquid assets ($13,200) to meet his $12,500 financial commitment to the applicant. See Initial Decision, paras. 31–32, 53. No exceptions were addressed to these determinations of the Presiding Judge.

[9] Petitioner's subsequent inquiry ascertained that the indebtedness underlying the lien has been paid by the Smiths and that the lien would be released.

[10] Under the circumstances present herein, the Broadcast Bureau does not support the addition of a disqualifying issue; however, the Bureau poses no objection to the inclusion of the requested comparative issue.

herein is not of sufficient magnitude to have required MBS to disclose its existence for even if E. Howard Smith had to meet the lien's underlying obligation individually, such satisfaction apparently would not affect his demonstrated ability to fulfill his outstanding obligations to the applicant.[11] See note 7, *supra;* and *Emerald Broadcasting Co.*, 30 FCC 2d 879, 887–89, 22 RR 2d 633, 643–45 (1971); *Virginia Broadcasters*, 16 FCC 2d 1024, 15 RR 2d 1016 (1969). Accordingly, we find petitioner's reliance upon *United Television Co., Inc.* (*WFAN–TV*), 19 FCC 2d 1060, 17 RR 2d 467 (1969), to be misplaced since the federal tax liens in that case were substantial and could have seriously affected the applicant's financial qualifications had reliance upon funds from the prospective lender-subscriber become necessary. Apart from the instant indebtedness, there is no indication that the Smiths, in their operation of Station WLPR–FM, have been untimely in meeting the station's debts. In view of both the prior manner in which the station's unemployment compensation payments were made and the alacrity with which the Smiths sought to rectify their misunderstanding, the Review Board does not regard this one instance of untimeliness as significant. While Peoples is somewhat skeptical of Howard L. Smith's recollection of the conversations with the aforenoted officials, it has not supported its conjecture with affidavits from these individuals. In the absence of properly documented allegations, the Board believes that the requested action is not warranted. See *Viking Television Inc.*, 16 FCC 2d 1018, 15 RR 2d 954 (1969); *Saul M. Miller*, FCC 63R–206, 25 RR 2d 417.

11. MBS also seeks enlargement of the issues against Peoples, arguing that Peoples lacks reasonable assurance of the availability of its proposed transmitter site and that the applicant has been remiss in apprising the Commission of changes relating to that site. Examination of the financial and engineering portions of the Peoples application, which was filed on October 24, 1966, reflects that the applicant plans to utilize the transmission facilities of former standard broadcast Station WMOZ and to that effect, on August 25, 1966, the applicant's president allegedly "entered into a lease-option agreement whereby either he or his nominee [Peoples] will lease the Station WMOZ transmitter site, building and equipment from Edwin H. Estes".[12] As noted by MBS, however, Mr. Estes has died and, on February 7, 1972, his widow and executrix transferred the property and facilities in question to Bernard Dittman, the president of WABB, Inc., which is the licensee of Station WABB(AM) and the permittee of Station WABB–FM, Mobile, Alabama.[13] According to petitioner, WABB,

[11] In the *Report and Order* adopting Rule 1.65 (FCC 64–1037, 29 FR 15516, 3 RR 2d 1622), the Commission noted that applicants are required to report "a change of circumstances . . . sufficiently altering the financial status of an applicant as to be pertinent to financial qualifications". "The rule", explained the Commission, "is not intended to require the reporting of minor changes which would have no significance in the Commission's consideration of an application under the public interest standard. We recognize that some material matters may normally fluctuate on a day-to-day basis, such as the financial position of an applicant . . . The rule does not contemplate the reporting of normal, forseeable everyday changes unless they are substantial and might have a significant impact on the status of an application." 3 RR 2d at 1625.

[12] Reportedly, the agreement provided for a $100 monthly rental, which would be increased to $600 per month upon a grant of the Peoples application, and an option to purchase the WMOZ facilities for $20,000.

[13] The general warranty deed, a copy of which is attached to the instant petition, recites that Mrs. Estes has a fee-simple estate in the property and that "said property is free and clear of all encumbrances".

Inc. has modified, with Commission approval, its existing construction permit so as to specify the WMOZ property as its transmitter site and has represented that it will dismantle the existing radio tower at that site (which Peoples has proposed to use) and erect a new 420-foot structure. See BMPH–13,476, granted May 10, 1972. Under these circumstances, MBS submits that Peoples can no longer be reasonably assured of the availability of its proposed transmitter site and that the instant proceeding should be remanded for further hearing under a site availability issue. A Rule 1.65 issue is also requested because of the applicant's failure to inform the Commission of the developments concerning the proposed site.

12. The Review Board will add the requested site availability issue. We agree with the Broadcast Bureau that the changes in ownership of the land and facilities in question and the present owner's apparent intention to utilize the premises for its own purposes require Peoples to set forth the basis for its assurance concerning the continued availability of the proposed site. See *Guy S. Erway, supra; Harry D. Stephenson and Robert E. Stephenson*, 15 FCC 2d 335, 14 RR 2d 945 (1968); *John N. Traxler and Alvera M. Traxler*, FCC 65R–191, 5 RR 2d 735 (1972); *Kittyhawk Broadcasting Corporation*, 8 FCC 2d 839, 10 RR 2d 628 (1967). The Board believes that the factual allegations before it, which are uncontroverted, raise a substantial question as to the availability of Peoples' site and merit the addition of an appropriate issue. The related Rule 1.65 issue, however, will not be added at this time. In this regard, the Board notes that no representation from either Mrs. Estes or Mr. Dittman concerning Peoples' alleged lease-option or the applicant's possible use of the property in question have been supplied and that MBS's allegations do not comport with the specificity requirements of Rule 1.229(c). See *William R. Gaston*, 35 FCC 2d 615, 14 RR 2d 741 (1972), review denied FCC 72–828, released September 22, 1972; *Pettit Broadcasting Co.*, FCC 71R–252, 22 RR 2d 717. Of course, should the evidence adduced under the site availability issue indicate the occurrence of substantial and material changes affecting the applicant's technical or other qualifications, our action herein would not foreclose MBS from requesting the addition of appropriate issues.[14]

13. MBS's other enlargement request is directed to the Azalea application. MBS contends that it recently became aware of the death of Dr. Francis T. England on September 16, 1971; that Dr. England had suscribed to a 20% interest in the Azalea corporation; and that this subscriber's demise "obviously produced a significant change in the ownership of Azalea". A Rule 1.65 issue is requested because of Azalea's alleged failure to keep its application substantially accurate and complete in all significant respects. No pleading in response to

[14] On October 20, 1972, MBS requested the Review Board to dismiss the Peoples application pursuant to Rule 1.568, arguing that the latter's reticence with respect to the above matters evidences an intention not to further prosecute its application. Such inference does not appear warranted and Peoples' course of conduct has not placed its application in default. Compare *Unlimited Service Organization*, 20 FCC 2d 289, 17 RR 2d 759 (1969), reconsideration denied 20 FCC 2d 1089, 18 RR 2d 197 (1970); *Lebanon Valley Radio*, 11 FCC 2d 31, 11 RR 2d 998 (1967). Accordingly, the Review Board will deny the motion to dismiss. For the same reasons, we will deny a similar motion to dismiss which MBS filed on November 13, against Azalea. See para. 13, *infra*. Moreover, we see no reason to await the filing of responsive pleadings.

the instant request has been submitted by Azalea, and the time for filing said pleading has expired. See Rule 1.294(c). Nor has leave to amend the Azalea application with respect to this matter been requested. Under the circumstances, the Review Board believes that a substantial question has been raised concerning the applicant's compliance with Rule 1.65 and an appropriate issue will, therefore, be added. See *Creek County Broadcasting Co.*, 31 FCC 2d 462, 470, 22 RR 2d 891, 902 (1971).

14. Three of the four remaining petitions request the Review Board to reopen the record for the limited purpose of accepting amendments to the application of WGOK. The WGOK application, as amended on October 24, 1966, discloses that the corporate applicant is comprised of two equal stockholders, Jules J. Paglin and Stanley W. Ray, Jr. who, through various other corporate entities, own the following standard broadcast stations: WXOK, Baton Rouge, Louisiana; WBOK, New Orleans, Louisiana; WLOK, Memphis, Tennessee; and KYOK, Houston, Texas. Through the proffered amendments, WGOK now seeks to update its application to reflect, *inter alia*, Commission consent to the voluntary assignment of Stations WBOK, WLOK, and KYOK and their disposal in June of 1969; the death of Stanley Ray, Jr. on November 19, 1970, and the corporate realignments following his demise; Mr. Paglin's assumption of the decedent's corporate and staffing duties at Station WGOK; and Commission consent to the voluntary assignment of Station WXOK and the sale of that station on June 1, 1972. WGOK asserts that no other party to this proceeding will be prejudiced by a grant of its petitions and acceptance of the attached amendments. None of the applicants herein opposes WGOK's request; however, the Broadcast Bureau submits that while the amendments may be accepted by the Board, their acceptance should be permitted only with the understanding that no comparative advantage accrue to WGOK by virtue of the reported changes.

15. Rule 1.65 requires an applicant to amend or seek to amend its pending application whenever the information set forth therein is no longer accurate and complete in all material respects. Disposition of the request to amend, however, depends on the facts of the particular case, for the "rule does not affect the rules governing amendment of applications in hearing status and is not intended as a means for applicants to improve their comparative positions vis-a-vis other applicants." *Report and Order, supra*, 3 RR 2d at 1625. See also *D. H. Overmyer Communications Co.*, 3 FCC 2d 557, 7 RR 2d 661 (1966). A showing of "good cause" must therefore be made before the proffered post-designation amendents can be accepted by the Review Board. See Rule 1.522(b). In this regard, foremost in the Board's consideration are the primary functions of Rule 1.522(b), namely, to prevent undue disruption of the hearing process and to avoid unfairly prejudicing the parties involved. See *Triple C Broadcasting Corporation*, 12 FCC 2d 503, 12 RR 2d 1008 (1968).[15] Here, as earlier indi-

[15] As we indicated in note 3 of the *Triple C* case, other elements, such as whether the tendered amendment resulted from a voluntary act of the amending applicant, must also be considered and their importance weighed in determining whether the required good cause is present. 12 FCC 2d at 503, 12 RR 2d at 1009.

cated, the record will have to be reopened and further hearing will be required. It does not appear that our acceptance of the WGOK amendments would either necessitate rehearing of matters already litigated or unduly impede the orderly progress of the further hearing. The reported revisions in the applicant's ownership structure are not alleged to have devolved from other than Mr. Ray's death and there is no suggestion that the new stockholder, Mr. Paglin's daughter, will actually participate in the management of the station. See *Triple C Broadcasting Corporation, supra.* Likewise, Mr. Paglin's succession to the corporate duties and responsibilities, which initially were to have been performed by the decedent, has not, in the Board's view, visibly enhanced the applicant's comparative position to the prejudice of the other applicants.[16] We therefore find no bar to acceptance of the amendments with respect to the foregoing matters. See *Creek County Broadcasting Co., supra; Lake-Valley Broadcasters, Inc.*, FCC 65R–120, 4 RR 2d 872. The Review Board, however, cannot make the required good cause determination with respect to the sale of the applicant's four broadcast stations. Examination of the WGOK amendments fails to disclose any reasonable relationship between the disposal of these stations and the death of Mr. Ray on November 19, 1970. Indeed, three of the stations were sold prior to November, 1970 and, as to the fourth station, WGOK acknowledged filing an application for the "voluntary assignment of license" more than five months after Ray's demise. More important, acceptance of the amendments in this regard would clearly improve WGOK's comparative position vis-a-vis the other applicants.[17] Accordingly, the portions of the subject amendments relating to the voluntary changes in the broadcast interests attributable to the amending applicant will be rejected. See *Allied Broadcasting, Inc.* v. *FCC*, 140 U.S. App. D.C. 264, 266–67 n.9, 435 F. 2d 68, 70–71 n.9, 19 RR 2d 2071, 2074–75 n.9 (1970); *The News-Sun Broadcasting Co.*, 24 FCC 2d 770, 775–76, 19 RR 2d 942, 951 (1970), review denied 27 FCC 2d 61, 20 RR 2d 1084 (1971); *The Young People's Church of the Air, Inc.*, FCC 61–401, 21 RR 476, reconsideration denied FCC 61–851, 21 RR 479.

16. In the remaining petition, Peoples requests the Board to reopen the record for the limited purpose of receiving into evidence two extensions of a bank commitment, upon which the applicant relied at the hearing, and certain related materials. To place the instant request in the proper perspective, some relevant background information is necessary. On October 25, 1967, the Review Board, at the request of MBS, specified a limited financial issue against Peoples because, *inter alia*, the duration, interest rate, repayment provisions and other items of its $100,000 line of credit from the First National Bank of Mobile (First National Bank) were not set forth in the commitment letter supplied by the applicant. See 10 FCC 2d 364, 11 RR 2d 541. The applicant's financial exhibits were introduced and received into evidence

[16] Decedent did not propose to spend an appreciable amount of time at the station. Accordingly, the Presiding Judge ranked WGOK as the least preferred applicant under the integration factor. See paragraphs 75–76, and 81 of the Initial Decision.

[17] As noted by the Presiding Judge, Azalea and Peoples have no other broadcast interest. By virtue of the Smith's ownership of Station WLPR–FM, WGOK was accorded a "slight" preference over MBS under the diversification of control criterion. See paragraphs 73–74, and 80 of the Initial Decision.

at the May 20, 1968 hearing session. Reliance was not placed upon the original bank commitment letter; rather, the earlier commitment was superseded by a March 16, 1968 commitment from the same bank, offering for another one-year period to lend Peoples $100,000 at a fixed rate of interest. This bank commitment, which again required the personal endorsements of Peoples' stockholders and their financial status remaining as of the date of the letter,[18] also provided for a one-year moratorium of principal payments with interest and principal thereafter payable monthly in thirty-six equal installments. The proposed bank loan was available throughout the hearing; however, the commitment, by its terms, expired on March 6, 1969—nearly three months after the record's closing on December 10, 1968.

17. On March 17, 1969, Peoples notified the Commission pursuant to Rule 1.65 that the First National Bank had extended its previous offer for another one-year period—until March 6, 1970. In this letter, the bank affirmed the earlier repayment terms, but left the interest rate to be determined at the time of the loan's closing. The bank also reserved the right to determine that the financial status of the endorsers had not deteriorated and called for the submission of current and complete financial information therefrom in form acceptable to the bank. In his Initial Decision, the Presiding Judge noted the extension of the March 6, 1968 commitment and resolved the financial issue in favor of Peoples, holding that the applicant had demonstrated reasonable likelihood of the availability of the $100,000 bank loan. With respect to the conditions expressed in the March 12, 1969 letter, he further stated that "[W]hile the bank has conditioned its commitment on its satisfaction with the financial condition at the time the loan is taken down of the principals of People's who would endorse the note, such reservation seems to be no more than an explicit statement of a reservation which is implicit in virtually all loan commitments of this type here involved". See paragraph 54 of the Initial Decision. Both WGOK and MBS excepted to the Presiding Judge's reference to and reliance upon the March 12, 1969 bank letter in resolving the financial issue directed toward Peoples.

18. We turn now to the subject petition, which was filed on March 13, 1970 and which contains the March 12, 1969 extension and another letter (dated March 4, 1970) from the First National Bank, again offering to extend the $100,000 loan commitment until March 6, 1971. Also submitted therewith is a May 4, 1970 correspondence from the bank's president supplementing the terms of the 1970 commitment letter and a letter from Peoples' stockholders renewing their agreement to supply the required endorsements. According to Peoples, the March 4, 1970 extension and related documents have not varied the substance of its record showing or the basis upon which it was found to be financially qualified. WGOK, on the other hand, disagrees and urges the rejection of the tendered documents. Alternatively, WGOK argues that due process requires that it be afforded an opportunity to test the availability of the proposed bank loan at a further hearing.

[18] The record reflects that on May 9, 1968, each of Peoples' stockholders agreed to supply the required endorsement. See Peoples Exh. 9.

19. Peoples has requested leave to conform its financial showing to the present realities: however, the proposed bank commitment, upon which the applicant's financial qualifications depends, has with the passage of time again expired by its terms, and the proffered showing is no longer current. Accordingly, the Review Board will dismiss Peoples' petition to reopen. Our action, however, should not be interpreted as foreclosing Peoples from demonstrating the present situation concerning its financial qualifications. To resolve the financial issue directed toward Peoples on the basis of a record showing which is nearly four years old and which, through the occurrence of subsequent events, is inconsistent with the present facts, would not, in the Board's judgment, be in the public interest where this proceeding will otherwise have to be remanded for further hearing and the matter in question relates to the basic qualifications of the applicant. *Cf. Click Broadcasting Company*, 25 FCC 2d 511, 20 RR 2d 150 (1970); *Hayward F. Spinks*, FCC 62R–70, 24 RR 197. In view of the foregoing circumstances, the Review Board concludes that Peoples should be afforded an opportunity to update its financial proposal at the further hearing. *Cf. Great Lakes Television, Inc.* FCC 57–772, 13 RR 718, reconsideration denied FCC 57–1155, 13 RR 722, affirmed *sub nom. Wyszatycki* v. *FCC*, 105 U.S. App. D.C. 399, 267 F. 2d 676, 18 RR 2119 (1959).

20. Accordingly, IT IS ORDERED, That the petition to reopen record, enlarge issues, and remand for further hearings, filed October 28, 1969, by People's Progressive Radio, Inc., IS DENIED; and that the petition to reopen the record and enlarge issues, filed October 20, 1972, by Mobile Broadcast Service, Inc., and the petition to reopen the record and enlarge issues, filed July 14, 1972, by Mobile Broadcast Service, Inc., ARE GRANTED to the extent indicated below, and ARE DENIED in all other respects; and

21. IT IS FURTHER ORDERED, That the petition to reopen the record, filed May 13, 1970, by People's Progressive Radio, Inc., IS DISMISSED as moot; and that the motions to dismiss, filed October 20, and November 13, 1972 by Mobile Broadcast Service, Inc. ARE DENIED; and

22. IT IS FURTHER ORDERED, That the amendment, filed May 24, 1971, by Azalea Corporation, IS ACCEPTED; that the petition for leave to amend, filed February 2, 1972, by Mobile Broadcast Service, Inc., IS GRANTED and the attached amendment, as supplemented, IS ACCEPTED; and that the petitions for leave to amend and reopen the record, filed March 24, 1971, November 22, 1971 and July 6, 1972, by W.G.O.K., Inc. (WGOK), ARE GRANTED and the tendered amendments ARE ACCEPTED to the extent indicated in paragraph 15 of this Memorandum Opinion and Order; and

23. IT IS FURTHER ORDERED, That the Record herein IS REOPENED; and that this proceeding IS REMANDED to the Administrative Law Judge for adduction of evidence and issuance of a Supplemental Initial Decision under the *Suburban* issues and the following added issues:

To determine whether People's Progressive Radio, Inc. has reasonable assurance of the availability of its proposed transmitter site.

To determine whether Azalea Corporation has failed to comply with the provisions of Section 1.65 of the Commission's Rules by keeping the Commission apprised of substantial changes in the matter specifically referred to in this Memorandum Opinion and Order and, if not, to determine the effect of such noncompliance on the basic and/or comparative qualifications of the applicant.

24. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof under the first added issue herein SHALL BE upon People's Progressive Radio, Inc., whereas the burden of proceeding under the second added issue SHALL BE upon Mobile Broadcast Service, Inc. and the burden of proof under that issue SHALL BE upon Azalea Corporation.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

(1) Petition to reopen record, enlarge issues, and remand for further hearing, filed October 28, 1969, by People's Progressive Radio, Inc. (Peoples).
(2) Opposition, filed November 25, 1969, by Mobile Broadcast Service, Inc. (MBS).
(3) Broadcast Bureau's opposition, filed November 28, 1969.
(4) Reply, filed December 8, 1969, by Peoples.
(5) Petition to reopen record, filed May 13, 1970, by Peoples.
(6) Comments on (5), filed May 22, 1970, by the Broadcast Bureau.
(7) Opposition to (5), filed June 8, 1970, by W.G.O.K., Inc. (WGOK).
(8) Reply to (6) and (7), filed June 18, 1970, by Peoples.
(9) Petition for leave to amend and reopen the record, filed March 24, 1971, by WGOK.
(10) Amendment, filed May 24, 1971, by Azalea Corporation. (Azalea).
(11) Certificate of service, and amendment thereto, filed October 14, 1971 and October 21, 1971, respectively, by Azalea.
(12) Broadcast Bureau's comments on (10), filed November 1, 1971.
(13) Comments on (10), filed November 19, 1971, by MBS.
(14) Petition for leave to amend and reopen the record, filed November 22, 1971, by WGOK.
(15) Petition for leave to amend, filed February 2, 1972, by MBS.
(16) Opposition to (15), filed February 11, 1972, by the Broadcast Bureau.
(17) Reply to (16), filed February 24, 1972, by MBS.
(18) Petition for leave to amend and reopen the record, filed July 6, 1972, by WGOK.
(19) Petition to reopen the record and enlarge issues, filed July 14, 1972, by MBS.
(20) Broadcast Bureau's comments on (19), filed July 26, 1972.
(21) Petition to reopen the record and enlarge issues, filed October 20, 1972, by MBS.
(22) Broadcast Bureau's comments on (21), filed November 1, 1972.
(23) Reply to (22), filed November 13, 1972, by MBS.
(24) Motion to dismiss, filed October 20, 1972, by MBS.
(25) Broadcast Bureau's comments on (24), filed November 1, 1972.
(26) Reply to (25), filed November 13, 1972, by MBS.
(27) Motion to dismiss, filed November 13, 1972, by MBS.

F.C.C. 72R-337

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of DUBUQUE COMMUNICATIONS CORP. (KDUB-TV), DUBUQUE, IOWA. For License to Cover Construction Permit	Docket No. 19339 File No. BLCT-2002

MEMORANDUM OPINION AND ORDER

(Adopted November 21, 1972; Released November 24, 1972)

BY THE REVIEW BOARD: BOARD MEMBER NELSON NOT PARTICIPATING.

1. This proceeding involves the application of Dubuque Communications Corp. (KDUB-TV) (KDUB) for license to cover construction permit for a television broadcast station in Dubuque, Iowa. By Memorandum Opinion and Order, FCC 71-1113 (36 FR 21619, published November 11, 1971), the Commission designated the application for hearing to determine all of the facts and circumstances surrounding the payments made by Gerald Green [1] to an employee of a network and the effect thereof on the applicant's qualifications to be a Commission licensee. Now before the Review Board is an appeal, filed July 19, 1972, from the Administrative Law Judge's Order (FCC 72M-856, released July 3, 1972) which denied KDUB's motion for admission of facts or, in the alternative, for production of documents.[2]

2. The facts involved are not complex. At a hearing session in this proceeding, Thomas G. Sullivan, a witness for the Broadcast Bureau, testified on direct examination that while employed by a network, he received a sum of money from Green at the time the applicant was seeking affiliation with the network. In conflict with Green's testimony that Green believed he was paying Sullivan the money to hire a consultant, Sullivan testified that he did not tell Green that the money was for that purpose. KDUB seeks, by its motion, to establish that John Kemper has testified before the Commission in a non-public investigatory hearing that he paid money to Sullivan in connection with the network affiliation of a station other than KDUB, and that, in that other transaction, Sullivan had asserted that the money Kemper gave him was for a consulant. KDUB now appeals from the Presiding Judge's Order denying its motion that either the Broadcast Bureau produce Kemper's testimony or admit to the alleged content of that testimony. KDUB asserts that knowing what Sullivan said to Kemper in one transaction is relevant to a determination of what Sullivan said to Green in a different, but allegedly similar, transaction. KDUB

[1] Green is president of Dubuque Communications Corp. and general manager of Station KDUB-TV.

[2] Also before the Board is the Broadcast Bureau's opposition, filed July 26, 1972.

further asserts that since the licensee of Kemper's station is no longer subject to Commission jurisdiction (the license was assigned and assets of the licensee were sold), the information contained in Commission investigatory files is no longer privileged. The Broadcast Bureau opposes KDUB's appeal, arguing that KDUB has failed to allege specific facts that could show that a common plan of action by Sullivan can be inferred and, thus, that acts in another case are relevant to the instant proceeding. The Bureau also contends that the alleged testimony was not necessary to the applicant in preparing its case [3] and that the Presiding Judge properly determined that considerations in favor of disclosure did not outweigh those against. Finally, the Bureau asserts that KDUB could have gotten Kemper, himself, to testify in this proceeding. In the Bureau's view, KDUB is only seeking to establish what Kemper told the Commission, and not, in fact, what Kemper knows. This is not a proper purpose of discovery, according to the Bureau.

3. The Review Board is of the view that the Presiding Judge did not abuse the discretion vested in him by his rejection of KDUB's motion. Cf. *Southern Broadcasting Co.* (*WGHP–TV*), 35 FCC 2d 338, 24 RR 2d 548 (1972). We note, first of all, that the record reveals that KDUB has, in fact, interviewed Kemper and yet has neither sought to present him as a witness nor given any reason for not doing so. Especially in light of this lack of any showing regarding unavailability, it is clearly proper to reject proffered testimony which was given in other proceedings and which concerns other facts and issues than those presently the subject of inquiry, where any cross-examination regarding that testimony "would not have been directed to the same material points of investigation and therefore could not have been an adequate test for exposing inaccuracies and falsehoods." 5 Wigmore, *Evidence*, Section 1386 (3rd ed. 1940). The Board further notes that such testimony, in any event, was offered to impeach a witness rather than to establish a pattern of conduct with regard to any activity directly in issue in the instant proceeding. As such, the evidence could be properly excluded as leading only to the formation of a new collateral issue. See 3 Wigmore, *supra*, Section 1023. In view of the foregoing, we conclude that the Presiding Judge could properly and reasonably reject such evidence as KDUB proposed to submit. Finally, the Board notes that KDUB has not shown that the ruling complained of is fundamental and affects the conduct of the entire proceeding. Absent such a showing, the appeal should have been deferred and raised as exceptions. See *WSTE–TV, Inc.* (*WSTE*), 15 FCC 2d 1026, 15 RR 2d 376 (1969); "*What the Bible Says, Inc.*", 12 FCC 2d 610, 12 RR 2d 1210 (1968). The Judge's Order will therefore not be disturbed and KDUB's appeal will be denied.

4. Accordingly, IT IS ORDERED, That the appeal from interlocutory Order of Hearing Examiner, filed July 19, 1972, by Dubuque Communications Corp. (KDUB–TV) IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[3] The Bureau notes that this appeal was filed after KDUB rested its case.

F.C.C. 72–1054

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF SECTION 73.202(b), TABLE OF ASSIGNMENTS, FM BROADCAST STATIONS (PITTSFIELD, MASS.)	Docket No. 19584 RM–1887

REPORT AND ORDER

(Adopted November 22, 1972; Released November 29, 1972)

BY THE COMMISSION:

1. On August 29, 1972, the Commission issued a Notice of Proposed Rule Making (FCC 72–779) in the above-entitled matter, proposing to assign Channel 240A to Pittsfield, Massachusetts. The proceeding was instituted on the basis of a petition filed by Radio Pittsfield, Inc., licensee of standard broadcast Station WGRG, Pittsfield, Massachusetts. Interested parties were invited to comment on the proposal on or before October 17, 1972, and could reply to such comments on or before October 26, 1972. There were no oppositions to the proposal. Supporting comments were filed by the petitioner.

2. Pittsfield is a city of 57,020 persons in Berkshire County (population 149,402).[1] It has two unlimited time AM stations, one daytime-only station (licensed to petitioner) and two FM channels, 269A and 288A. The FM channels are occupied by stations operated as FM adjuncts to the two unlimited time AM stations.

3. Petitioner points out that Pittsfield is the center of the manufacturing industry which is the heart of the Berkshire County economy. He further states that, besides being of significant value to the Pittsfield area, an additional FM facility is necessary to compete effectively with other stations in Pittsfield, since its AM facility offers daytime service only while its competitors offer day and nighttime service on both AM and FM. In supporting comments petitioner states that it fully expects to apply for the channel and if authorized, to construct its proposed FM station promptly.

4. Since there appears to be a need and demand for an additional assignment in Pittsfield and since the additional assignment can be made without adverse effect on other stations and without exceeding the number contemplated for a community of its size, we are of the view that the requested additional assignment would serve the public interest and should be granted.

[1] Population figures cited are from the 1970 U.S. Census.

5. Authority for the amendment adopted herein is found in Sections 4(i), 303, and 307(b) of the Communications Act of 1934, as amended.

6. Accordingly, IT IS ORDERED, That, effective January 8, 1973, the Table of Assignments contained in Section 73.202(b) of the Commission's Rules and Regulations IS AMENDED, insofar as the community named below is concerned to read as follows:

City	*Channel No.*
Pittsfield, Mass	240A, 269A, 288A.

7. IT IS FURTHER ORDERED, that this proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

38 F.C.C. 2d

109-018—72——2

F.C.C. 72R–339

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LEROY GARRETT, TRADING AS GARRETT BROADCASTING SERVICE (WEUP), HUNTSVILLE, ALA.	Docket No. 19258 File No. BP–18295
WRBN, INC. (WRBN), WARNER ROBINS, GA.	Docket No. 19259
For Construction Permits	File No. BP–18409

APPEARANCES

A. L. Stein, on behalf of Garrett Broadcasting Service (WEUP); *Donald E. Ward*, on behalf of WRBN, Inc. (WRBN); and *John T. Kelly*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

DECISION

(Adopted November 21, 1972; Released November 27, 1972)

BY THE REVIEW BOARD: BERKEMEYER, PINCOCK AND KESSLER.

1. The two principal questions raised in this proceeding before the Review Board are: (a) whether waiver of Commission Rule 73.30(c)[1] is justified where, *inter alia*, a minimum of three and a maximum of eight combined aural services (AM and FM), are available in any one portion of an applicant's proposed nighttime primary service area; and (b) whether a new AM service to approximately 6,000 blacks who now receive no nighttime AM primary service or only one such service provides adequate justification for such waiver. Administrative Law Judge Ernest Nash, in an Initial Decision, FCC 72D–28, released May 2, 1972, answered the above questions in the negative and, therefore, concluded that the application of Garrett Broadcasting Service (WEUP), (Garrett), for Huntsville, Alabama, requesting a change in its existing facilities so as to operate unlimited time by adding a 500 watt directional facility during nighttime hours, must be denied. The Presiding Judge also concluded that the mutually exclusive application of WRBN, Inc. (WRBN) for Warner Robins, Georgia, requesting an identical change in facilities should be granted as it is

[1] Rule 73.30(c) states, "The transmitter of each standard broadcast station shall be so located that primary service is delivered to the borough or city in which the main studio is located in accordance with the rules and regulations of this subpart." Rule 73.188(b)(1) states, "A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city." Rule 73.188(b)(2) states, "A minimum field intensity of 5 to 10 mv/m will be obtained over the most distant residential section." Section 73.188(b)(2) was not specifically specified as an issue (although 73.188(b)(1) was). However, as the Bureau's proposed findings indicate, Garrett's proposed operation does not comply with Section 73.30(c), which requires coverage in accordance with the provisions in subpart 73 of the Commission's Rules, which provisions include Section 73.188(b)(1) and (b)(2).

in substantial compliance with Commission rules. The Board has reviewed the Initial Decision in light of the exceptions and brief in support thereof, filed May 31, 1972, by Garrett, the arguments of the parties [2] and our examination of the record. In general, we agree with the Presiding Judge's findings of fact and conclusions and, except as modified herein and in the rulings on exceptions contained in the attached Appendix, those findings and conclusions are adopted. However, the Board will supplement the Initial Decision with a brief discussion of the above two questions.[3]

2. The first question involves Garrett's contention that the public interest requires that Rule 73.30(c) be waived because its proposal would provide a first AM primary service to 12,689 persons [4] in Huntsville and Madison and the maximum number of AM services within the proposed service area is three. The Board does not believe that these factors warrant waiver for the following reasons: First, the grossly inadequate coverage leaves unserved over one-fourth of the population and one-half of the area of Huntsville—the city of license. Second, as noted by the Presiding Judge, the minimum number of combined aural (AM and FM) reception services within the total proposed service area of Garrett is three; moreover, even this situation occurs in an area where only 159 persons are involved. The maximum number of combined aural services is eight.[5] In this regard, it is important to note that in recent Commission pronouncements there is an emphasis of treatment of AM and FM as a single aural service in evaluating unserved or underserved areas. *Cf. Report and Order* in Docket No. 19074, 32 FCC 2d 937 (1972) at paras. 12 and 20. In *Cherokee Broadcasting Co.*, 17 FCC 2d 121 at 123, 15 RR 2d 1205 at 1208 (1969), a proceeding involving an applicant for an FM license and a Section 307(b) issue, the Commission stated that "our long-term goal must be the establishment of an integrated AM–FM aural service and we should look to the day when AM and FM stations can be regarded as component parts of a total aural service." See also, *Report and Order* in Docket No. 15084, 2 RR 2d 1658 (1964), and *Babcom Inc.*, 24 FCC 2d 690, 19 RR 2d 883 (1970) petition for reconsideration denied, 27 FCC 2d 437, 21 RR 2d 6 (1971). Finally, if the Garrett proposal were granted, it would reduce the nighttime coverage in the city of Warner Robins by the WRBN proposal from 92.4% to 81.4% of the population of that city.

3. The second question relates to Garrett's claim that (a) 85% of the blacks in the city will be served by his operation; and (b) there is presently "widespread dissatisfaction" with black oriented radio. The Board has reviewed the applicable precedent and, in our view, such precedent precludes a waiver under all the present circumstances.

[2] Oral argument by the parties was heard by a panel of the Review Board on October 24, 1972.

[3] In view of the present determination we will also sever and grant the application of WRBN. *Cf.* the Board's Memorandum Opinion and Order, FCC 72R–295, released October 16, 1972.

[4] All population data is based on the 1970 U.S. Census.

[5] There are also four television stations in Huntsville. See para. 5 of the Initial Decision.

Initially, it is to be noted that the record in this proceeding is practically totally barren of any showing of the claimed "dissatisfaction" and that nowhere has Garrett indicated any specifics of what is wrong with existing programming or what he would do to improve the situation if his request for a change in facilities were granted.[6] In addition, this record is barren of evidence that the black population of Huntsville do not have FM receivers and, hence, are underserved from that standpoint. Moreover, the Commission has recently had occasion to consider similar arguments in cases involving questions of waiver of other technical rules. In *Mel-Lin, Inc.*, 22 FCC 2d 165, 18 RR 2d 787 (1970),[7] the Commission, after agreeing with the Review Board that the applicant had "made commendable efforts to ascertain and propose programs designed to serve the needs of . . . [the minority population] on a continuing basis . . . ," reversed the Review Board's grant of the application. The Commission suggested that "representatives of concerned organizations might properly contact the existing fulltime stations . . . to see if greater efforts can be made to establish more meaningful communications with the [black] audience." In a later case, *Champaign National Bank*, 22 FCC 2d 790 at 792, 18 RR 2d 1170 at 1174 (1970), the Commission, after denying a request for waiver of Section 73.24(b)(3) of the Rules,[8] stated that "[a]ttempts to cure programming deficiencies by distorting or ignoring sound allocation and station assignment principles would constitute acts of expediency running counter to our statutory mandate to make the most effective use of the crowded AM band on a national basis." See also, *1360 Broadcasting Co., Inc.*, 36 FCC 1478, 2 RR 2d 824 (1964), where a request for waiver of the 10% rule based upon the special needs of

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[6] *Cf. Tucson Radio, Incorporated (KEVT)*, 452 F.2d 1380 at 1382, —— U.S. App. D.C. —— (1971), where the Court stated that:

> In this case, KEVT stated only its own conclusion that adequate nighttime service in Spanish would not be forthcoming from the eleven FM and AM stations in Tucson. It referred to no examples of refusals to serve upon request, or to attempts made to bring the existing need to the attention of the other stations and the Commission through challenges to license renewals or the filing of competing applications as outlined in the Commission's *Policy Statement Concerning Comparative Hearings Involving Regular Renewal Applicants*, 22 F.C.C. 2d 424 (1970). Since no facts of this kind were alleged to establish an *unfilled need*, the Commission did not abuse its discretion in summarily refusing to waive its established requirement. (Emphasis supplied.)

It is also significant to note that the Court at footnote 1 stated that:

> In construing this regulatory language, there is a crucial difference between failure to *serve* a group which cannot understand the language broadcasted and a failure to *reach* a group which chooses not to listen because of program content.

[7] This proceeding involved Section 73.28(d)(3) of the Commission's Rules, which is often referred to as the 10% rule. This Rule prohibits grants, with certain exceptions not relevant here, of applications that receive interference affecting more than 10% of the population in the station s proposed normally protected primary service area.

[8] Section 73.24(b)(3) provides, *inter alia*, that a new nighttime operation will be authorized only after it is satisfactorily shown that the proposal will bring a first primary AM service to at least 25% of the area within the proposed interference-free nighttime service contour or 25% of the population residing therein.

[9] It should be mentioned that there have been, of course, cases where waiver of the 10% rule has been granted on the basis of proposed programming; however, those cases represent a prior less stringent approach with respect to violations of the Commission's Rules which in recent years has been re-evaluated to avoid excessive interference and congestion and to conserve spectrum space for underserved aural areas. For a discussion of such cases, see *Mel-Lin, supra*.

the black audience was denied,[9] and a similar holding in *Grantell Broadcasting Co.*, 23 FCC 2d 74, 18 RR 2d 1063 (1970).

4. The Commission has long held that an applicant proposing to operate in a manner which results in a substantial violation of its technical rules assumes a heavy burden to establish that a grant of its application is in the public interest. Here, there can be no question that (a) the proposal's grossly inadequate coverage of the city of Huntsville is a public interest detriment and results in a grossly inefficient use of this frequency at night; (b) there has been no concomitant showing of sufficient public interest benefits which outweigh this detriment; and (c) such lack of coverage to the city of license is not justified for the purpose of establishing a sixth Huntsville nighttime aural transmission outlet, or a fourth nighttime AM transmission outlet. Nor has the Huntsville applicant established, on the basis of this record, that any portion of its proposed service area is an underserved aural reception radio area. (See para. 3, *supra.*) Under these circumstances, we find the applicant's argument that it is, in effect, penalized here because Huntsville is a large, irregular shaped, city caused by annexations and marked expansion resulting from the phenomenon of enormous urban expansion particularly during recent years, wholly lacking in merit.[10] Moreover, the fact that Huntsville existing stations do not now cover the entire city in no way justifies the addition of a new substandard proposal, and this fact can be accorded no significant weight in our determination of the waiver question here. In sum, we believe Garrett assumed a heavy burden of proof in this case to overcome the gross inadequacy of coverage of Huntsville and, in our view, such burden has not been met.

5. Accordingly, IT IS ORDERED, That the application of WRBN, Inc. (WRBN), IS SEVERED from this proceeding and GRANTED; and

6. IT IS FURTHER ORDERED, That the application of Garrett Broadcasting Service (WEUP), IS DENIED.

SYLVIA D. KESSLER,
Member, Review Board,
Federal Communications Commission.

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[10] *Broadcasting, Inc.*, 20 FCC 2d 713, 17 RR 2d 1117 (1969), cited by the applicant at the oral argument, is inapposite. There, an applicant's proposal was found to be in substantial compliance with Section 73.188 of the Rules even though its proposed nighttime 5 mv/m contour encompassed only 38.3% of the area of the city. However, the 5 mv/m contour encompassed 91.7% of the population of the city and a showing was made that the proposal covered approximately 96% of the urbanized residential areas within the city. No comparable showing has been made here.

APPENDIX

Rulings on Exceptions of Garrett Broadcasting Service (WEUP)

Exception No.	*Ruling*
1, 10, 11	*Denied* for the reasons stated in para. 4 of this Decision.
2	*Denied.* The applicant has taken one sentence of footnote 1, page 7, of the Initial Decision out of context. Clearly, the denial of the application is based on the grossly inadequate coverage of Huntsville, and the failure of the applicant to justify a waiver of Rule 73.30(c).
3, 4	*Denied.* See the Review Board's Memorandum Opinion and Order, FCC 72R–257, released September 20, 1972, and the Presiding Judge's Order, FCC 72M–567, released May 1, 1972.
5	*Granted.*
6, 13, 17	*Denied* as without decisional significance.
7, 8	*Denied.* The Presiding Judge's findings in this regard accurately and fairly reflect the record. See para. 19 of his Initial Decision.
9	*Granted.* The 5.0 mv/m coverage within the Huntsville city limits extends to 101,213 persons (73%) within 48.8 square miles; whereas the 4.86 mv/m primary service contour would extend to 106,576 persons (78%) in Huntsville within 48.8 square miles. See footnote 1, page 6, of the Initial Decision. (The area figures are exclusive of the airport. See, *Voice of the New South, Inc.*, 19 FCC 2d 137, 16 RR 2d 1167 (1969); and *Central Coast Television*, 14 FCC 2d 985, 14 RR 2d 575 (1968), review denied by the Commission FCC 69–614, released June 9, 1969, petition for reconsideration dismissed, FCC 69–840, released August 1, 1969.)
12	*Denied.* No agreement of the applicants here can compromise the public interest problems involved in the Garrett proposal for reasons set forth in the Initial Decision and this Decision.
14	*Denied* on the basis (a) of the totality of the Board's Decision and of the Presiding Judge's Initial Decision, and (b) of our prior Memorandum Opinion and Order. See ruling on Exception No. 3.
15	*Denied.* See paras. 8, 10, 11, 16, 17 and 18 of the Initial Decision. These paragraphs show that the Presiding Judge considered all facets of potential coverage.
16	*Denied.* Garrett is now the owner of Station WEUP, albeit a daytime only station. See also, para. 3 of this Decision.

F.C.C. 72D-28

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
LEROY GARRETT, TRADING AS GARRETT BROADCASTING SERVICE (WEUP), HUNTSVILLE, ALA.	Docket No. 19258 File No. BP-18295
WRBN, INC. (WRBN), WARNER ROBINS, GA.	Docket No. 19259
For Construction Permits	File No. BP-18409

APPEARANCES

A. L. Stein, Esq., on behalf of Leroy Garrett, tr/as Garrett Broadcasting Service; *Donald E. Ward, Esq.*, on behalf of WRBN, Inc.; and *John T. Kelly, Esq.*, on behalf of the Chief, Broadcast Bureau, Federal Communications Commission.

INITIAL DECISION OF HEARING EXAMINER ERNEST NASH

(Issued April 28, 1972; Released May 2, 1972)

1. Leroy Garrett, trading as Garrett Broadcasting Service (WEUP) (Garrett) and WRBN, Inc. (WRBN), filed mutually exclusive applications for changes in the facilities of Station WEUP, Huntsville, Alabama, and Station WRBN, Warner Robins, Georgia, respectively. Each proposes to change from daytime only to unlimited time, operating on 1600 kHz.

2. These applications were designated for hearing on the following issues: (FCC 71-617, 36 FR 11881, published June 22, 1971)

1. To determine the areas and populations which would receive primary service from the proposals and the availability of other primary aural service (1 mv/m or greater in the case of FM) to such areas and populations.
2. To determine whether the proposed operation of station WEUP would provide 5 mv/m coverage to the entire city of Huntsville, Alabama, as required by section 73.30(c) of the rules, and, if not, whether circumstances exist which warrant a waiver of said section.
3. To determine whether the proposed operation of station WEUP would provide 25 mv/m coverage to the main business district of Huntsville, Alabama, as required by section 73.188(b)(1) of the rules, and, if not, whether circumstances exist which warrant a waiver of said section.
4. To determine with respect to the application of WRBN, Inc., whether its proposed $30,000 bank loan is still available, the terms and conditions of the loan, and, in light thereof, whether the applicant is financially qualified.
5. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, which of the proposals would better provide a fair, efficient and equitable distribution of radio service.
6. To determine, in the light of the evidence adduced pursuant to the foregoing issues which, if either, of the applications should be granted.

The Review Board added the following issues: (FCC 71R–290, released September 23, 1971, 31 FCC 2d 873)

To determine whether the proposed operation of Station WRBN would provide interference-free coverage to the entire city of Warner Robins, Georgia, as required by Section 73.30(c) of the Rules, and, if not, whether circumstances exist which warrant a waiver of said section.

To determine whether the proposed operation of Station WRBN would provide 25 mv/m coverage to the main business district of Warner Robins, Georgia, as required by Section 73.188(b) (1) of the Rules, and, if not, whether circumstances exist which warrant a waiver of said section.

3. A prehearing conference was held on July 28, 1971. Hearings were held on November 9 and 23, 1971. On the latter date, the hearing record was closed.

FINDINGS OF FACT

4. Garrett Broadcasting Service (Garrett), operates Station WEUP on 1600 kHz with 5 kilowatts power, daytime only, Class III at Huntsville, Alabama. WRBN, Inc. (WRBN), operates Station WRBN on 1600 kHz with 1 kilowatt power, daytime only, Class III at Warner Robins, Georgia. Both applicants request authority to change their existing facilities so as to operate unlimited time by adding a 500 watt directional facility during nighttime hours. The Garrett and WRBN applications were found to be mutually exclusive and were designated for consolidated hearing because a grant of Garrett's application would raise the WRBN RSS [1] nighttime limitation of 11.26 mv/m to 14.54 mv/m and, therefore, WRBN would fail to serve a significant portion of the city of Warner Robins at night. No objectionable interference results to the Garrett proposal from that of WRBN.

5. Huntsville, Alabama, population 137,802 [2] including 16,729 Negroes, is the county seat of Madison County, population 186,540. It is situated approximately 88 miles north of Birmingham near the Tennessee border. Huntsville is the central city of the Huntsville Urbanized Area, which has a total population of 146,565. The Huntsville Standard Metropolitan Statistical Area consists of Madison and Limestone Counties and has a total population of 228,239. The present broadcast facilities authorized in Huntsville include five standard broadcast stations, three of which operate unlimited time, two FM stations and four TV stations as follows:

AM:	WAAY, 1550 kHz, 500 W, 5 Kw–LS, DA–N, U, II
	WFIX, 1450 kHz, 250 W, 1 Kw–LS, U, IV
	WBHP, 1230 kHz, 250 W, 1, Kw–LS, U, IV
	WVOV, 1000 kHz, 10 Kw, DA–D, II
	*WEUP, 1600 kHz, 5 Kw, D, III
FM:	WAHR, 99.1 MHz, 3.2 Kw, 45 ft., B
	WNDA, 95.1 MHz, 3.1 Kw, −50 ft., B
TV:	WAAY–TV, Ch. 31, 741 Kw, 1,290 ft.
	WHIQ, Ch. 25, 631, Kw, 1,170 ft., Educ.
	WHNT–TV, Ch. 19, 398 Kw, 1,060 ft.
	WMSL–TV, Ch. 48, 700 Kw, 1,190 ft.
	*Garrett's present facility

[1] Root sum square of interfering signals in accordance with Section 73.182(o) of the Commission's Rules.

[2] All population data shown herein are based upon the 1970 U.S. Census. Official Notice of 1970 U.S. Census data is taken.

6. The proposed nighttime directional antenna radiation pattern shape resembles the configuration of a four leaf clover with a major lobe directed to the southeast to cover the main business district and as much of the southern portion of the city as possible and another major lobe directed to the southwest to cover most of the western portion of the city, including AM "white area". Based on radiation values taken from the proposed directional antenna pattern and using ground conductivity values established by non-directional measurements on the daytime operation of applicant's Station WEUP in the directions of 0, 40, 85, 105, 125, 147, 225, 245 and 300 degrees true combined with ground conductivity values taken from Figure M–3 of the Rules for areas between radials, Station WEUP would provide nighttime primary service within its proposed 4.86 mv/m interference-free contour as follows:

Contour (mv/m)	Population	Area (square miles)
4.86	111,812	76

7. The following stations provide AM primary service (2.0 mv/m or greater) to the proposed nighttime primary service area in the proportions indicated.

Station	Location	Night limit	Percentage of coverage
WAAY	Huntsville	5.2 mv/m	25–50
WBHP	Huntsville	19.9 mv/m	0–25
WFIX	Huntsville	20.8	0–25
WSM	Nashville, Tenn	0.5 mv/m	100

Coverage by Station WSM is limited to rural areas proposed to be served.

8. The entire proposed service area receives three or less AM primary services as follows:

Number of present services	Total population	Area (square miles)	Percentage of coverage area	
			Population	Area
0	12,689	21.4	11.3	28
1	53,286	37.8	47.7	49.8
2	22,320	10.0	20.0	13.2
3	23,507	6.8	21.0	8.9

The city of Huntsville and Madison town, Alabama, are the only two urban areas within the proposed nighttime primary service areas. The areas receiving no primary service lie within these two communities. Madison town has a population of 3,086 in an area of 17 square miles.

Of the 12,689 persons receiving no primary service, 11,057 reside in Huntsville and 1,632 persons in an area of 7 square miles [3] reside in Madison town representing 53% of the population and 39% of the area of Madison town.

9. FM stations provide FM service (1.0 mv/m or greater) to the proposed nighttime primary service area as follows:

Station	Location	Percentage of coverage
WAHR (FM)	Huntsville, Ala.	75–100
WNDA (FM)	Huntsville, Ala.	75–100
WJOE (FM)	Athens, Ala.	50–75
WDRM (FM)	Decatur, Ala.	75–100
WRSA (FM)	Decatur, Ala.	100

Considering both aural services (AM plus FM), a minimum of three and a maximum of eight are available in any one portion of the proposed nighttime primary service area. The area receiving three aural services is located in Madison town and includes 159 persons in an area of 0.7 square mile.

10. The city of Huntsville is irregular in shape. Its boundaries extend about 20 miles from north to south and about 15 miles from east to west. The proposed nighttime facility would operate from the existing transmitter site located just inside the northwestern city limits of Huntsville some 3.5 miles northwest of the center of the city. The proposed operation is limited to 500 watts power at night in order to provide protection to a number of existing stations on the frequency. Because of the low power proposed, several corners of the city would not be included within the proposed 5.0 mv/m contour. For example, to the north the 5.0 mv/m contour falls a maximum distance of 6.6 miles inside the city limits; to the east, 2.3 miles; to the southeast, 5.8 miles; and to the southwest 4.9 miles. Within the city of Huntsville, the proposed nighttime 5.0 mv/m contour would include 101,213 persons in an area of 51.7 square miles or 73.4% of the total city population of 137,802 and 49% of the total city area of 105.6 square miles. As a result, the proposal does not comply with the requirements of Section 73.30(c) of the Rules.

11. Garrett seeks to justify waiver of the city coverage requirement with the following claims:

(1) The large area of the city and its very irregular shape make it impossible to cover the entire city. If the portion of the Huntsville airport within the city limits was removed, the proposal would cover 51% of the city area.

(2) The proposed 4.86 mv/m nighttime interference-free contour will cover 106,576 persons in an area of 51.7 square miles in the city of Huntsville or 77.3% of the city population and 48.9% of the city area.[4]

[3] Part of the "white area" claimed by the applicant falls within portions of the Madison town that are classified as rural according to the Huntsville Urbanized Area map in the 1970 U.S. Census (PC(1)–A2). The Census shows the urban part of Madison town contains 2,276 persons and the rural part contains 810. The rural area is served by Station WSM. In any event, the difference is deemed to be small and not decisional.

[4] There is a difference in coverage of only 0.1 mile between the 4.86 and 5.0 mv/m contours which cannot be seen on maps used to illustrate the contours. Therefore, the applicant used an area of 51.7 square miles for both contours. The difference can be seen on enumeration district maps and was recognized in counting population. The population and

(3) A first AM primary service will be provided to 12,689 persons in Huntsville and Madison, Alabama and the maximum number of AM services within the proposed service area is three.

(4) Nighttime service would be provided to 14,135 Negroes in Huntsville or 84% of the 16,729 Negroes in the city and to 6,019 Negroes who receive none or one primary service.

(5) Primary service would be provided to 90% of the area and 95% of the population within the proposed normally protected 4.0 mv/m contour, thus the proposed operation represents a very efficient utilization of the frequency.[5]

(6) It is not possible to select a site which would provide coverage to the entire city of Huntsville and comply with the allocation conditions on the frequency. A mountain range on the eastern city limits precludes moving far enough for a site east of the city. A major lobe to the west from a site east of the city would miss most of the city. If the array were redesigned to radiate a major lobe to the southeast, the radiation would be limited by Station WHEW, Riviera, Florida and northern and southern portions of the city would not be served. In addition, the western portion of the city (containing "white area") would not be served. An array was chosen with one major lobe to the southeast to cover the main business district and as much of the southern portion of the city as possible and a major lobe to the southwest to cover most of the western portions of the city including the "white area". The array chosen covers more of the city than would have been possible with the other two. Since it is not possible to select a site which would provide coverage to the entire city, a site was selected which would provide coverage to the maximum possible number of persons and cover the required "white area". A different site would not provide significantly different coverage of Huntsville. A move to the north or west would reduce coverage of the main business district and reduce coverage of the "white area" in the western portion of the city. A move to the southeast (closer to town) would not improve total coverage as "white area" to the north would be lost. In addition, it is not possible to obtain a site closer to downtown. In summary, it is not possible to select a site different than that proposed which will serve a significantly larger portion of Huntsville because of allocation conditions on the channel and the extremely large city limits.

12. Station WEUP commenced daytime operation in 1958. When the application for daytime operation was originally filed, it was determined that 1600 kHz was the only frequency which would permit daytime operation with five kilowatts power and a nondirectional antenna. According to testimony of applicants' engineer at the hearing, no frequency search has been made since then to determine whether there are any other frequencies available to achieve better nighttime

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area within the city limits not included within the proposed 4.86 mv/m interference-free contour are as follows:

Direction	Population	Percent of city population	Area (square miles)	Percent of city area
North and East	12,139	8.8	24.4	23
Southeast	18,190	13.2	19.5	18.6
Southwest	897	0.7	10.0	9.5
Total	31,226	22.7	53.9	51.1

This tabular breakdown is not relevant to issue 2 because the 5.0 mv/m contour is controlling under that issue. Section 73.188(b) is designed to insure the location of transmitters so as to provide a premium grade of service to the principal community as opposed to primary service and it imposes a higher standard than that required for primary service. See *The Greenwich Broadcasting Corp.*, 36 FCC 1294, 1307 (1964). Accordingly, use of the 4.86 mv/m contour and this breakdown, based thereon, is not relevant to issue 2.

[5] Applicant's use of only 500 watts power, resulting in a failure to cover Huntsville at night, does not support this statement. 500 watts power is the minimum amount for a station of applicant's class. See Section 73.21(b)(1)(ii) of the Commission's Rules.

coverage because reduction in daytime power would have been required on another frequency.

13. On the basis of ground conductivity values obtained from the field intensity measurements on the daytime operation of Station WEUP, the proposed nighttime 25 mv/m contour will encompass the main business district. This includes the City Hall, Court House, Post Office and two main shopping centers. It will encompass the largest shopping area in Huntsville. Accordingly, the proposed operation complies with the provision of Section 73.188(b)(1) of the Rules.[6]

14. Warner Robins, Georgia, has a population of 33,491[7] and is 220 miles southeast of Huntsville, Alabama. It is in Houston County (pop. 62,924) in the central part of the state about 15 miles south of Macon, Georgia. It is not a part of any urbanized area but is a part of Macon Standard Metropolitan Statistical Area (pop. 206,342) which includes Bibb and Houston Counties. At present, broadcast facilities in Warner Robins include two standard broadcast stations which operate daytime only, one FM station and no TV stations as follows:

AM: WAVC, 1350 kHz, 5 Kw, D, III
*WRBN, 1600 kHz, 1 Kw, D, III
FM: *WRBN–FM, 101.7 MHz, 3 Kw, 205 ft., A

*WRBN's present facilities.

15. The proposed nighttime directional antenna pattern is designed so that most of the energy is radiated in one major lobe toward the east and southeast in the general direction of Warner Robins. Based on radiation values taken from the proposed directional antenna pattern and using ground conductivity values established by non-directional measurements made on the daytime operation of applicant's Station WRBN in the directions of 125, 135, 146, 166.5, 181 and 196 degrees true, and as obtained from Figure M–3 of the Rules in other directions, the proposed nighttime coverage of Station WRBN is as follows:

Contour (mv/m)	Population	Area (sq. mi.)
11.26*	34 853	29.4
14.54**	30,172	22.5

*If granted alone
**If both applications granted

16. There is no standard broadcast station providing nighttime AM primary service to any portion of WRBN's proposed nighttime primary service area. If granted alone, WRBN would provide a first nighttime AM primary service to 34,853 persons in an area of 29.4

[6] Section 73.188(b)(1) reads as follows:
(b) The site selected should meet the following conditions: (1) A minimum field intensity of 25 to 50 mv/m will be obtained over the business or factory areas of the city.

[7] According to the 1970 U.S. Census. Including annexations since the Census, the new population is 33,760.

square miles. If granted with Garrett, WRBN would provide a first nighttime AM primary service to 30,172 persons in an area of 22.5 square miles, or a decrease of 4,681 persons in an area of 6.9 square miles. This would represent a reduction of 13.4% in population and 23.5% in area.

17. FM stations provide FM service (1.0 mv/m or greater) to the proposed nighttime primary service as follows:

Station [8]	Location	Percentage of coverage
WMAZ-FM	Macon, Ga	100
WDEN-FM	Macon, Ga	100
WRBN-FM	Warner Robins, Ga	100
WPGA-FM	Perry, Ga	0–25

[8] Middle Georgia Broadcasting Co. has an application on file for a new FM station on Channel 300 at Macon, Ga. (BPH–123, D–18279). It also would serve 100%. By order of the Review Board released Nov. 10, 1971, the effective date of an Initial Decision (FCC 71D–61) released Sept. 13, 1971 granting the application was stayed. However, on January 12, 1972, the Board released a Memorandum Opinion and Order (FCC 72R–5) denying the request for limited intervention, filed September 29, 1971, by the Broadcast Good Music! Committee, 23 RR 2d 510.

A minimum of three and a maximum of four aural services (in this instance all FM) are available in any one portion of the proposed nighttime primary service area. If granted alone, 32,823 persons in an area of 27.9 square miles would receive a fourth aural service from the proposal and 2,030 persons in an area of 1.5 square miles would receive a fifth. If both applications are granted, 29,462 persons in an area of 22 square miles would receive a fourth aural service and 710 persons in an area of 0.5 square mile would receive a fifth.

18. The city limits of Warner Robins are roughly rectangular in shape and extend some 8 miles from north to south and 3 to 4 miles from east to west.[9] Several minor changes have been made in the city limits of Warner Robins since the 1970 U.S. Census was prepared and the new city area was determined to include 33,760 persons in an area of 11.3 square miles. The proposed nighttime facility would operate from a transmitter site located within the corporate limits of the city in the northwest sector about 2 miles from the center of the city.[10] If granted alone, the proposed 11.26 mv/m interference-free contour within the city would include 31,202 persons in an area of 10.1 square miles, or 92.4% of the city population and 89.4% of the city area. If granted with Garrett, the proposed 14.54 mv/m interference-free contour within the city would include 27,479 persons in an area of 8.7 square miles, or 81.4% of the city population and 77% of the city area.

19. WRBN's proposal would not provide complete coverage of the city of Warner Robins. WRBN claims that it is highly unlikely that

[9] When originally filed, the application showed that using ground conductivity values from Figure M–3 of the Rules there would be 99.5% coverage of the population of Warner Robins if granted alone. In the order of designation, the Commission found this to be in substantial compliance with the Rules. The issues were enlarged based on field intensity measurements taken on Station WRBN by the opposing applicant.

[10] For the nighttime operation, a new transmitter site immediately adjacent to and east of the present site would be used. WRBN, by letter dated December 10, 1969, has indicated that it will apply to the Commission to move both the non-directional AM daytime facility and the FM facility to the site specified in its amendment filed on that date. (See the instant application).

any site can be obtained which would guarantee 100% night coverage of the city of Warner Robins; provide the required coverage of the main business district of that city; and also guarantee protection to cochannel stations. WRBN also admits that it cannot say positively that there is no site that would improve the coverage of Warner Robins assuming a suitably redesigned array. It believes that the improvement, if any, would probably be small. WRBN considers the present site is optimum in regard to obtaining maximum coverage over its city.

20. On the basis of ground conductivity values established by field intensity measurements on the daytime operation of Station WRBN, the proposed nighttime 25 mv/m contour will cover all of the main business district of Warner Robins. Thus, the proposal complies with the provision of Section 73.188(b)(1) of the Rules.

21. By amendment accepted November 4, 1971 (FCC 71M–1759, released November 5, 1971), WRBN modified its financial proposal and submitted a current balance sheet. WRBN's modified proposal indicates a total anticipated first year cost of $14,111.00.

22. In order to meet this requirement, WRBN relies upon a current balance sheet dated September 30, 1971 in lieu of a bank letter. That balance sheet shows the following:

Current assets:	
Cash on hand and in banks	$12,029.14
Saving certificates	50,000.00
Accounts receivable—Trade	33,768.19
Total	95,797.33
Current liabilities (amount due in 1 year):	
Notes payable—Banks	32,010.95
Notes payable—Others	7,688.24
Accounts Payable—Office furniture	3,923.02
Accrued payroll taxes	1,355.69
Total	44,977.90

CONCLUSIONS

1. Section 73.30(c) of the Commission's Rules requires that a standard broadcast station be so located as to provide primary service to the city in which its main studio is located. The Garrett proposal would provide primary service to only 73 percent of the population and 49 percent of the area of Huntsville. It fails, by a substantial margin, to meet this requirement. *Voice of the New South*, 19 FCC 2d 137, 140 (1969). In view of the considerable service deficiencies present here, a heavy and compelling burden is placed upon Garrett to justify a waiver. *William D. Stone*, 21 FCC 2d 665 at 669 (1970).

2. Garrett's reasons for waiver of Section 73.30(c) are detailed in the findings. Consideration of these reasons leads to the conclusion that they are not sufficient to justify waiver. Cf. *Voice of the New South*, *supra*. For example, even if it were concluded that no better site is available, such a conclusion would still only be one aspect of a waiver consideration. In and of itself, the unavailability of an alternative site is not dispositive of a Section 73.30(c) waiver question. *William D. Stone*, *supra*, at 670. Most importantly, here, however, the

applicant has not demonstrated that there is a significant need for a fourth nighttime AM and a sixth nighttime aural transmission outlet in Huntsville or for additional reception service within its proposed nighttime service area.[11] In addition, if the Garrett proposal were granted, it would reduce coverage in the city of Warner Robins by proposed Station WRBN from 92.4% to 81.4% of the population of that city.[12] Under all the circumstances, it must be concluded that waiver of Section 73.30(c) of the Rules is not justified, and that Garrett's application should be denied. *Voice of the New South, supra.*

3. The proposed nighttime 25 mv/m contour of Garrett will encompass the main business district in Huntsville. In addition, it will encompass the two main shopping areas of the city. Garrett's proposal complies with the requirement of Section 73.188(b)(1) of the Rules.

4. WRBN would operate from a transmitter site within the corporate city limits of Warner Robins in the northwest sector some 2 miles from the center of the city. If granted alone, the proposed 11.26 mv/m contour would encompass 92.4% of the population and 89.4% of the area of the city of Warner Robins. If granted simultaneously with the Garrett proposal, the proposed 14.54 mv/m contour would encompass 81.4% of the population and 77% of the area of the city. The present transmitter site is considered near to being optimum for coverage of the city. In view of the fact that the WRBN proposal would provide the second nighttime aural transmission outlet and the first nighttime competitive voice in Warner Robins, it is concluded that, with 92.4% coverage of the city population, a waiver of Section 73.30(c) of the Rules is warranted. *Community Broadcasting Company of Hartsville*, FCC 71R–384, released January 5, 1972, 23 RR 2d 486; *Broadcasting Inc.*, 20 FCC 2d 713 (1969); *KDEF Broadcasting Co.* (KDEF), 30 FCC 635 (1961). The question as to whether 81.4% coverage can be condoned need not be decided, since the Garrett application will be denied.[13]

5. The proposed WRBN nighttime contour will cover all of the main business district of Warner Robins. Accordingly, the WRBN proposal complies with the requirement of Section 73.188(b)(1) of the Rules.

6. WRBN is required to show the availability of $14,111.00. WRBN has submitted a current balance sheet indicating $50,000 of current assets in excess of current liabilities. Therefore, it is concluded that WRBN is financially qualified.

7. Garrett's application must be denied for failure to provide coverage of the city of Huntsville at night as required by Section 73.30(c) and 73.188(b)(2) of the Rules. Waiver of city coverage is warranted with respect to the WRBN proposal in view of the extent of its coverage and the facts that warrant waiver of the requirements of the Rules

[11] The minimum number of aural reception services within the proposed nighttime service area of the applicant is three. This situation occurs in an area where only 159 persons are involved.

[12] For this reason, the two applications continue to be mutually exclusive.

[13] A grant of both applications apparently would be acceptable to the applicants. This would result in an unwarranted deviation from the Commission's requirements designed to assure optimum broadcast services to the public.

any site can be obtained which would guarantee 100% night coverage of the city of Warner Robins; provide the required coverage of the main business district of that city; and also guarantee protection to cochannel stations. WRBN also admits that it cannot say positively that there is no site that would improve the coverage of Warner Robins assuming a suitably redesigned array. It believes that the improvement, if any, would probably be small. WRBN considers the present site is optimum in regard to obtaining maximum coverage over its city.

20. On the basis of ground conductivity values established by field intensity measurements on the daytime operation of Station WRBN, the proposed nighttime 25 mv/m contour will cover all of the main business district of Warner Robins. Thus, the proposal complies with the provision of Section 73.188(b) (1) of the Rules.

21. By amendment accepted November 4, 1971 (FCC 71M–1759, released November 5, 1971), WRBN modified its financial proposal and submitted a current balance sheet. WRBN's modified proposal indicates a total anticipated first year cost of $14,111.00.

22. In order to meet this requirement, WRBN relies upon a current balance sheet dated September 30, 1971 in lieu of a bank letter. That balance sheet shows the following:

Current assets:	
Cash on hand and in banks	$12,029.14
Saving certificates	50,000.00
Accounts receivable—Trade	33,768.19
Total	95,797.33
Current liabilities (amount due in 1 year):	
Notes payable—Banks	32,010.95
Notes payable—Others	7,688.24
Accounts Payable—Office furniture	3,923.02
Accrued payroll taxes	1,355.69
Total	44,977.90

CONCLUSIONS

1. Section 73.30(c) of the Commission's Rules requires that a standard broadcast station be so located as to provide primary service to the city in which its main studio is located. The Garrett proposal would provide primary service to only 73 percent of the population and 49 percent of the area of Huntsville. It fails, by a substantial margin, to meet this requirement. *Voice of the New South*, 19 FCC 2d 137, 140 (1969). In view of the considerable service deficiencies present here, a heavy and compelling burden is placed upon Garrett to justify a waiver. *William D. Stone*, 21 FCC 2d 665 at 669 (1970).

2. Garrett's reasons for waiver of Section 73.30(c) are detailed in the findings. Consideration of these reasons leads to the conclusion that they are not sufficient to justify waiver. Cf. *Voice of the New South*, *supra*. For example, even if it were concluded that no better site is available, such a conclusion would still only be one aspect of a waiver consideration. In and of itself, the unavailability of an alternative site is not dispositive of a Section 73.30(c) waiver question. *William D. Stone*, *supra*, at 670. Most importantly, here, however, the

applicant has not demonstrated that there is a significant need for a fourth nighttime AM and a sixth nighttime aural transmission outlet in Huntsville or for additional reception service within its proposed nighttime service area.[11] In addition, if the Garrett proposal were granted, it would reduce coverage in the city of Warner Robins by proposed Station WRBN from 92.4% to 81.4% of the population of that city.[12] Under all the circumstances, it must be concluded that waiver of Section 73.30(c) of the Rules is not justified, and that Garrett's application should be denied. *Voice of the New South, supra.*

3. The proposed nighttime 25 mv/m contour of Garrett will encompass the main business district in Huntsville. In addition, it will encompass the two main shopping areas of the city. Garrett's proposal complies with the requirement of Section 73.188(b)(1) of the Rules.

4. WRBN would operate from a transmitter site within the corporate city limits of Warner Robins in the northwest sector some 2 miles from the center of the city. If granted alone, the proposed 11.26 mv/m contour would encompass 92.4% of the population and 89.4% of the area of the city of Warner Robins. If granted simultaneously with the Garrett proposal, the proposed 14.54 mv/m contour would encompass 81.4% of the population and 77% of the area of the city. The present transmitter site is considered near to being optimum for coverage of the city. In view of the fact that the WRBN proposal would provide the second nighttime aural transmission outlet and the first nighttime competitive voice in Warner Robins, it is concluded that, with 92.4% coverage of the city population, a waiver of Section 73.30(c) of the Rules is warranted. *Community Broadcasting Company of Hartsville*, FCC 71R–384, released January 5, 1972, 23 RR 2d 486; *Broadcasting Inc.*, 20 FCC 2d 713 (1969); *KDEF Broadcasting Co.* (KDEF), 30 FCC 635 (1961). The question as to whether 81.4% coverage can be condoned need not be decided, since the Garrett application will be denied.[13]

5. The proposed WRBN nighttime contour will cover all of the main business district of Warner Robins. Accordingly, the WRBN proposal complies with the requirement of Section 73.188(b)(1) of the Rules.

6. WRBN is required to show the availability of $14,111.00. WRBN has submitted a current balance sheet indicating $50,000 of current assets in excess of current liabilities. Therefore, it is concluded that WRBN is financially qualified.

7. Garrett's application must be denied for failure to provide coverage of the city of Huntsville at night as required by Section 73.30(c) and 73.188(b)(2) of the Rules. Waiver of city coverage is warranted with respect to the WRBN proposal in view of the extent of its coverage and the facts that warrant waiver of the requirements of the Rules

[11] The minimum number of aural reception services within the proposed nighttime service area of the applicant is three. This situation occurs in an area where only 159 persons are involved.

[12] For this reason, the two applications continue to be mutually exclusive.

[13] A grant of both applications apparently would be acceptable to the applicants. This would result in an unwarranted deviation from the Commission's requirements designed to assure optimum broadcast services to the public.

to the extent that WRBN's proposal falls short. WRBN has established its financial qualifications. It is concluded that the application of WRBN should be granted.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party, or the Commission reviews this Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Commission's Rules, the application of Leroy Garrett, tr/as Garrett Broadcasting Service, Huntsville, Alabama (BP–18295) IS DENIED; and the application of WRBN, Inc., Warner Robins, Georgia (BP–18409) IS GRANTED.

ERNEST NASH,
Hearing Examiner,
Federal Communications Commission.

F.C.C. 72-1046

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re	
IDAHO VIDEO, INC., JEROME AND GOODING, IDAHO	CSR-44 (ID024) CSR-45 (ID023)
MAGIC VALLEY CABLE VISION, INC., TWIN FALLS, IDAHO	CSR-46 (ID030)
SEE-MORE CABLE, INC., CHADRON, NEBR.	CSR-27 (NE024)
PUEBLO TV POWER, INC., PUEBLO, COLO.	CSR-104 (CO021)
Requests for Declaratory Rulings and Special Relief Pursuant to Section 76.7 of the Commission's Rules	

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 28, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The Commission has before it for consideration: (a) a "Petition for Declaratory Ruling and Expedited Consideration Thereof," filed July 12, 1972, and a "Petition for Interpretive Ruling," filed May 12, 1972, both by The KLIX Corporation, licensee of Television Broadcast Station KMVT, Twin Falls, Idaho; (b) a "Petition for Interpretive Ruling and Expedited Consideration," filed May 24, 1972, by Duhamel Broadcasting Enterprises, licensee of Station KDUH-TV, Hay Springs, Nebraska; and (c) a "Petition for Immediate Relief," filed May 4, 1972, by Pikes Peak Broadcasting Company, licensee of Station KRDO-TV, Colorado Springs, Colorado.[1] Although directed against specific cable television systems in Idaho, Nebraska, and Colorado, these pleadings raise related issues of general applicability.

2. Essentially, the petitions seek clarification of the same-day program exclusivity responsibilities of a cable system located in the Mountain Time Zone when: 1) the cable system was not providing same-day program exclusivity prior to March 31, 1972, but received a valid request for such exclusivity prior to that date and did not seek timely waiver of the applicable rules; 2) a television station filed a timely petition seeking continuation of same-day exclusivity, pursuant to Section 76.93(b) of the Commission's Rules as it read prior to amendment in the *Memorandum Opinion and Order on Reconsideration of the Cable Television Report and Order*, FCC 72-530, 36 FCC

[1] A number of responsive pleadings have been filed by the directly affected cable systems, and have also been considered.

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2d 326, but the petition was not timely served on all necessary parties or was incomplete; and 3) a television station did not file a petition seeking continuation of same-day exclusivity, pursuant to former Section 76.93(b) of the Rules.

3. When the Commission amended Section 76.93(b) on reconsideration, we recognized the minimal effect of a simultaneous-only exclusivity rule on program duplication in the Mountain Time Zone, given the unique network programming practices prevalent there, and concluded that simultaneous-only exclusivity should be the exception, rather than the rule. In this connection, we indicated in footnote 9 of the reconsideration that all pleadings which the previous Section 76.93(b) had elicited would be dismissed as moot, absent a showing that they were still relevant under the revised provision. This conclusion evidenced our clear intent to return network program exclusivity responsibilities and rights in the Mountain Time Zone to their pre-March 31, 1972 status, as though former Section 76.93(b) had never been adopted. We reaffirm that intent here.

4. Thus, a Mountain Time Zone cable system's present network program exclusivity obligations do not depend on whether a television station filed a request for continuation of same-day exclusivity on or before April 17, 1972 (pursuant to former Section 76.93(b)), or whether any petition then filed was served on all necessary parties or was complete. Any Mountain Time Zone cable system that was providing same-day network program exclusivity prior to March 31, 1972 should now be providing same-day exclusivity, absent special agreement or waiver, and any system that received a valid request for program exclusivity prior to March 31, 1972, and did not file a request for waiver within 15 days thereafter should likewise now be providing same-day exclusivity, regardless of whether a waiver request was subsequently filed (unless such waiver request has been granted). See former Section 74.1109(h), as interpreted in *Tehachapi TV Cable Co.*, FCC 67-67, 6 FCC 2d 469, and Section 76.97.

5. Since it appears that each of the cable systems involved in this proceeding previously provided same-day program exclusivity, or failed to file a timely waiver request, we do not believe it appropriate to allow 30 days for compliance with this decision; 10 days should provide adequate time to adjust existing equipment or make arrangements for manual switching pending the arrival of equipment. Of course, this compliance will be re-examined in the context of subsequent Commission action on any pending exclusivity waiver requests.

In view of the foregoing, we find that grant of the subject petitions for declaratory rulings and special relief would be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition for Declaratory Ruling and Expedited Consideration Thereof" and the "Petition for Interpretive Ruling" filed by The KLIX Corporation, the "Petition for Interpretive Ruling and Expedited Consideration" filed by Duhamel Broadcasting Enterprises, and the "Petition for Immediate Relief" filed by Pikes Peak Broadcasting Company ARE GRANTED.

IT IS FURTHER ORDERED, That, the "Petition for Special Relief Against the Above Named CATV Systems" (CSR–44, 45, and 46), filed by The Klix Corporation IS DISMISSED.

IT IS FURTHER ORDERED, That, pending further order of the Commission on any pending program exclusivity waiver requests, Idaho Video, Inc., Magic Valley Cable Vision, Inc., See-More Cable, Inc., and Pueblo TV Power, Inc. ARE DIRECTED to comply with the same-day network program exclusivity requirements of Section 76.93(b) of the Commission's Rules on their cable television systems at Jerome and Gooding, Idaho, Twin Falls, Idaho, Chadron, Nebraska, and Pueblo, Colorado, respectively within ten (10) days of the release date of this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1038

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of INTERMEDIA, INC. (ASSIGNOR) AND ROBERT P. INGRAM TRADING AS KBEA BROADCASTING CO. (ASSIGNEE) For Assignment of License of Station KBEA, Mission, Kans., and Station KBEY-FM, Kansas City, Mo.	File No. BAL-7689

ORDER

(Adopted November 22, 1972; Released November 29, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. The assignee is fully qualified.

2. The assignor acquired control of the licenses of Stations KBEA and KBEY-FM on July 15, 1970. The instant application was filed on August 30, 1972. Therefore, the subject application is governed by the Commission's Three Year Rule, Section 1.597. Intermedia has requested a waiver of this rule.

3. In support of its request for waiver of the "Three Year Rules" Intermedia represents that: (1) It is a subsidiary of SCI Industries, Inc. a publicly held corporation; (2) that it is also the licensee of station KQTV-TV, St. Joseph, Missouri, KLYX-FM Clear Lake City, Texas and KGRV-FM, St. Louis, Missouri; (3) that due to sustained losses in all broadcast operations the Board of Directors of SCI voted to dispose of all broadcasts interests and retire from the broadcast industry permanently; and (4) no profit will be made from the sale of Stations KBEA and KBEY-FM, since its total investments in these stations is $979,167 [1] and the sale price is $950,000.

4. Based on the foregoing representations, particularly SCI's determination to withdraw permanently from the broadcast field and Intermedia's showing that no profit will be made on this transaction, we find no evidence of trafficking and therefore a waiver of the hearing requirements of Section 1.597 of our Rules would be appropriate.

5. In view of the foregoing we find that a grant of this application will serve the public interest, convenience and necessity. Accordingly, it is ORDERED that the subject application is hereby GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

[1] The $979,167 investment is comprised of the following: Cost of Acquisition $750,000, Improvements $189,000 and home office expense $40,165.

F.C.C. 72-1028

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of ITT WORLD COMMUNICATIONS, INC. PRESS WIRELESS, INC. Applications for Requisite Commission Authorizations With Respect to the Proposed Merger of Press Wireless, Inc. Into ITT World Communications, Inc.	File Nos. 6463-C4-AL-68, 6464-C4-AP-AL-68, T-C-2192, S-C-L-32-1, T-D-15787

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 22, 1972)

BY THE COMMISSION: COMMISSIONER REID CONCURRING IN THE RESULT.

1. The Commission has for consideration a filing by the Communications Workers of America (CWA) dated April 14, 1971, clarifying and formalizing a prior filing dated January 21, 1971, requesting that the Commission order arbitration of a CWA grievance against ITT World Communications, Inc. (ITT) pursuant to *ITT World Communications, Inc.*, 25 F.C.C. 2d 88 (1970). The CWA complaint alleges that ITT reduced the compensation of former Press Wireless employees in violation of paragraph 1 of Appendix A of *ITT World Communications, Inc.*, 1 F.C.C. 2d 213 (1965), relating to the transfer of control of Press Wireless to ITT.

2. The Commission in its 1965 decision authorized the transfer of control of Press Wireless to ITT, and included in Appendix A of that authorization certain provisions for the protection of employees employed by the carriers involved in that transfer. Paragraph 1 provides, in part, that during a period continuing up to July 28, 1971 no employee should have his compensation reduced as a consequence of the transfer of control approved by the Commission.[1] CWA asserts that (1) in 1968, after the transfer of control to ITT of Press Wireless, ITT consolidated and brought under its own management the Press Wireless operations in San Francisco, California; (2) prior to this consolidation, while under Press Wireless ownership and management, the Press Wireless employees received mileage allowance for travel to and from work; and (3) subsequent to this consolidation, ITT eliminated

[1] Paragraph 1 of Appendix A, in pertinent part, provides: That *during the period* commencing six months prior to the instant application for approval of transfer of control and *continuing for six years from the date of the approval of such application, no employee of* any carrier (including subsidiaries thereof) which is a party to such application regardless of his period of employment, *shall*, in contemplation of or *as a consequence of such transfer of control . . . have his compensation reduced* . . . by the carrier to which control may be transferred (emphasis added). 1 F.C.C. 2d 213, 223 (1965).

the mileage allowance. Using the grievance procedure contained in the collective bargaining agreement, the CWA filed a complaint with ITT alleging that the mileage allowance was "compensation" and that therefore paragraph 1 of Appendix A of the Commission's 1965 decision was violated. ITT contended that the compensation referred to in paragraph 1 of Appendix A related only to base pay as set forth in its wage structures, and that the FCC in Appendix A did not contemplate travel allowances. By January 1969, the CWA had unsuccessfully processed its complaint through the third step of the grievance procedure and did not take any further action on it until corresponding with the Commission in January 1971.

3. Letters have been filed by both CWA and ITT commenting on the positions of the other regarding this matter and on certain questions raised by the Commission in correspondence with the parties. We are not here now concerned with the merits of the CWA complaint, but rather with the questions of whether that complaint is subject to consideration pursuant to procedures established by the Commission and if it is, how it should be processed. The Commission's 1965 decision approving the transfer of control of Press Wireless to ITT, while providing certain employee protection provisions in Appendix A, did not specify the procedures that parties should follow in processing complaints which alleged violations of Appendix A. In *ITT World Communications Inc.*, 21 F.C.C. 2d 426 (1970), however, the Commission set forth procedures for the processing of the aforementioned complaints. The Commission ordered that, to the extent practicable, Appendix A complaints should be resolved by the usual employer-employee dispute procedures. Specifically, it required that complaints be considered under the grievance procedures [2] and then if necessary and the parties desire, under the arbitration procedures of the collective bargaining contract. In addition, the decision provided for Commission review of the final decision resulting from these procedures. This decision however, was conditioned on ITT's acceptance of the procedures contained therein. ITT petitioned for partial reconsideration and the Commission, in *ITT World Communications*, 25 F.C.C. 2d 88 (1970), modified in some respects the previously specified procedures. In this modification, the Commission, pursuaded that arbitration may not be necessary in every instance, authorized a direct appeal to the Commission when a dispute could not be resolved in the grievance procedure. It also provided that the Commission would then determine the appropriate procedures for further resolving the complaint. On October 20, 1970, ITT submitted its agreement and undertaking to settle Appendix A complaints in a manner set forth in the Commission's February 16, 1970 Order, as modified by the September 1, 1970 Order. In January 1971 the CWA filed an appeal to the Commission requesting that ITT be ordered to arbitrate the complaint here under consideration pursuant to our newly prescribed procedures.

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[2] The decision noted that time limitations contained in the grievance procedures of the applicable collective bargaining agreement should be disregarded, *ITT World Communications, Inc.*, 21 F.C.C. 2d 426, 435 (1970).

4. ITT contends first that since the CWA processed its complaint through the third and final step of grievance in 1968 and did not further pursue its complaint at that time, the Commission is now precluded from applying to such complaint the procedures it prescribed during 1970. To support this contention, ITT cites language in our February 1970 decision to the effect that the prescribed procedures shall apply to alleged violations of Appendix A that may exist now or arise in the future. ITT claims that when it accepted the terms of our decision prescribing procedures to be followed, it relied on the prospective nature of this language and that consideration now of CWA's complaint would give our procedures an unwarranted retrospective effect. In a second more general contention, ITT argues that the equitable doctrine of laches is applicable to the instant case. While the thrust of this contention is not entirely clear from the pleadings, it appears that ITT considered arbitration to be an appropriate remedy when the grievance procedure had been exhausted in 1969 and thus the CWA's failure at that time to pursue its complaint through arbitration now precludes it from reasserting its complaint.

5. In considering ITT's first and primary contention that application of the Commission procedures to the CWA complaint would give them an unwarranted retrospective effect, it is necessary to first look at the Commission's intent in prescribing these procedures. In 1970 when the Commission first prescribed procedures to be followed it was attempting to remedy the deficiency in its 1965 decision which failed to specify the course parties should follow in pursuing an alleged violation of Appendix A. Thus, in 1970, the Commission was for the first time providing a formally approved and agreed-upon method of resolving such disputes. Accordingly, we do not believe it would be consistent with this remedial intent for the Commission to now consider the CWA complaint closed. Viewing the issue from this perspective, we do not believe it would be appropriate to consider that the alleged violation of Appendix A had ceased to exist after its having been processed through the third step of grievance in 1968.

6. ITT's claim of laches does not go to the question whether the prescribed procedures are applicable to a previously processed complaint but rather to the question whether, because the CWA failed in 1969 to pursue its complaint beyond the grievance procedure in the collective bargaining agreement, it would now be inequitable to require ITT to process it pursuant to our procedures. In this regard, it must first be pointed out that ITT has not shown any additional harm or injury, other than the damages from a possible adverse ruling, which might result from now being required to process CWA's complaint through arbitration. Moreover, it would not be appropriate for the Commission to now assume, as ITT does, that the collective bargaining grievance and arbitration procedures, which lacked Commission sanction in 1968, were then an appropriate remedy which the CWA had available for resolving its claim. While these procedures were available, and were to some extent utilized, the Commission did not determine that they were appropriate until 1970. In light of the foregoing, we do not believe, nor has ITT shown, that CWA's conduct

with respect to their complaint was in any way unreasonable or prejudicial to ITT so as to support a claim of laches.

7. In the instant case since the complaint in question has previously been taken through the complete grievance procedure, we believe that no useful purpose would now be served by reinstituting the grievance procedure for the same complaint. An examination of the relevant issues involved herein, however, leads us to conclude that arbitration is now the appropriate method of attempting to resolve the dispute. The question of whether mileage pay for travel to and from work is included in the meaning of the term "compensation" as used in the Commission's decisions includes, among other things, how travel pay is otherwise treated under the labor contract and the usual interpretation give to "compensation" in labor disputes. Thus, we believe that arbitration of this dispute using the procedures specified in the labor contract between CWA and ITT is now warranted.

ORDER

Accordingly, IT IS ORDERED, that ITT is directed to submit the subject CWA complaint to arbitration in accordance with the applicable provisions specified in the labor contract presently in effect between ITT and CWA.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Dissent to Commission Action of October 26, 1972 Noting Staff Report on Maryland, West Virginia and District of Columbia 1972 Renewals

NOVEMBER 2, 1972.

DISSENT BY COMMISSIONER JOHNSON TO STAFF ACTION ON MARYLAND, WEST VIRGINIA, AND DISTRICT OF COLUMBIA RENEWALS

On October 26, 1972, the Commission noted actions to be taken by the staff under delegated authority in connection with disposition of October 1, 1972 broadcast renewal applications for Washington, D.C., Maryland and West Virginia. Commissioner Johnson dissented and has now issued the attached statement.

DISSENTING OPINION OF COMMISSIONER NICHOLAS JOHNSON

As it has done on so many prior occasions, the majority today refuses to find fault with the license renewals of several broadcast stations on the grounds that those stations have adamantly refused to meet the public's need for news, public affairs and other non-entertainment programming. And, as I have done on an equal number of occasions, I dissent.

The Federal Communications Commission has been directed by Congress to ensure that, in return for their normally very lucrative use of the publicly owned airwaves, broadcasters serve "the public interest." Yet, in the tradition of Catch—22, we have never offered those broadcasters even the slightest hint as to what the term "public interest" means. This is because we, ourselves, do not know—or at least never attempted to come up with a definition.

In 1968 former Commissioner Kenneth Cox and I tried to add a little reason to our otherwise chaotic policies. We suggested that, at a very minimum, broadcasters could not possibly be serving the needs of the public unless they broadcast at least 5% news, 1% public affairs, and 5% other non-entertainment programming. The majority, preferring to sink deeper into the quagmire of non-principled decision-making, rejected our proposal.

And so, today, the majority blithely approves the Broadcast Bureau's renewal of 221 of the 418 broadcast stations in the Washington, D.C.-Maryland-Virginia-West Virginia area. And this in spite of the following revelations:

(1) Three of the A.M. radio stations and three of the television stations propose to program less than 5% news. All of these stations propose far less news than they proposed three years ago—no doubt because each station's performance in the area of news programming during the last three years fell abysmally short of prior promises. Four of these station's news programming proposals for the coming three years do not even begin to approach a 4% figure; indeed, WDCA–TV in Washington, D.C. has the gall to propose less than 1.5% news.

(2) Eight of the radio stations and one television station—WDCA once again—propose less than 1% public affairs programming.

(3) 26 of the radio stations propose to devote less than 5% of of their time for the combined categories of public affairs and other non-entertainment programs.

Even absent any minimum standards by which to judge a broadcaster's past performance, these figures should give the majority pause. However, the majority is apparently of the view that, absent such standards—standards which the majority steadfastly refuses to promulgate—a broadcaster's license should be renewed virtually automatically, since to deny a license without first informing the broadcaster what he must do would be too harsh a remedy. And that is what I mean about Catch—22.

F.C.C. 72-1016

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re CEASE AND DESIST ORDER TO BE DIRECTED AGAINST MEADVILLE MASTER ANTENNA, INC., MEADVILLE, PA.	File No. CSC-27 PAO 30

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 21, 1972)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. On September 29, 1972, Great Lakes Communications, Inc. (successor to Lamb Communications, Inc.), licensee of Station WICU-TV, Erie, Pennsylvania, filed a "Petition For Issuance Of Order To Show Cause" directed against Meadville Master Antenna, Inc., operator of a cable television system at Meadville, Pennsylvania. Meadville Master Antenna, Inc., filed an "Opposition and Motion To Dismiss Petition For Issuance Of An Order To Show Cause" and Great Lakes has replied. Great Lakes' petition asks that Meadville be directed to show cause why it should not be ordered to cease and desist from violation of the program exclusivity requirements of Section 76.93 of the Commission's Rules (Section 76.93 of the Rules substituted simultaneous program exclusivity for the same day exclusivity of former Section 74.1103), and for coordination of such proceedings with those in Docket No. 19479.

2. Meadville Master Antenna, Inc., filed July 1, 1966, a petition for waiver of Section 74.1103 vis-a-vis the signal of station WICU-TV, and that petition was denied. *Meadville Master Antenna, Inc.*, 17 FCC 2d 506 (1969), recon. den. 25 FCC 2d 315 (1970). The United States Court of Appeals reversed this action and remanded the matter, *Meadville Master Antenna, Inc.* v. *Federal Communications Commission*, 443 F. 2d 282 (3d Cir. 1971). Thereafter, we ordered a hearing to determine whether Meadville should be granted a waiver of the program exclusivity requirements of Section 76.93 of the Rules. *Meadville Master Antenna, Inc.*, 34 FCC 2d 358 (1972), recon. den. FCC 72-554 ——— FCC 2d ———. It is in connection with these proceedings in Docket No. 19479, that Great Lakes seeks to have a Show Cause Order issued. In essence, Great Lakes feels that statements of Meadville's counsel suggest the possibility that—should we rule against Meadville—Meadville may not comply with our Order.

3. Under the circumstances, in this case, the Commission has determined that an evidentiary hearing should be held to determine whether

or not a waiver of its rules would serve the public interest. Until there has been a determination in the evidentiary hearing of the waiver issue, the stay provided by Section 76.97 of the Rules (formerly 74.1109(h)) is in effect, and Meadville is under no obligation to provide WICU–TV with program exclusivity. *Inter alia*, it appears that Meadville earlier provided exclusivity when ordered to do so by the United States Court of Appeals for the Third Circuit. In these circumstances, we see no justification for impugning Meadville's motives by issuing the requested Order at this time.

In view of the foregoing, the Commission finds that issuance of the requested Order to Show Cause would not be consistent with the public interest.

Accordingly, IT IS ORDERED, That the "Petition For Issuance Of Order To Show Cause" filed September 29, 1972, by Great Lakes Communications, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 72-1021

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of MEDIA ENTERPRIZES, INC. (KQXI), ARVADA, COLO. Requests: Change in station location to Denver, Colo. For Modification of License	Docket No. 19635 File No. BML-2320

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 21, 1972)

BY THE COMMISSION: COMMISSIONER REID ABSENT.

1. The Commission has before it for consideration (i) the above-captioned application; (ii) a petition for acceptance, waiver and grant filed by the applicant; (iii) a petition for reconsideration filed by KLIR, Inc., licensee of station KLIR, Denver, Colorado; (iv) a petition to deny filed by Lakewood Broadcasting Service, Inc., licensee of station KLAK, Lakewood, Colorado; (v) a petition to deny filed by KLIR, Inc.; and (vi) opposition and reply pleadings to the petitions to deny.

2. KLIR has filed a petition for reconsideration of the Commission action (Order FCC 70-566 adopted May 27, 1970), waiving section 1.571, note 2, of the rules (AM "freeze") and accepting the KQXI application for filing. Procedurally, KLIR argues that its petition should be accepted although it is allegedly untimely according to section 1.106(f) of the rules, which provides for the filing of a petition for reconsideration within 30 days of the release of the full text of the action taken. It contends that it filed the petition within 30 days of the release of the public notice of the adoption of the order and that the rule should be interpreted to allow the filing of a petition for reconsideration within 30 days from either the release of the full text of the order or the release of the public notice of the action taken.

3. Substantively, the petitioner claims that the application seeks to change an AM assignment on a demand basis, and that the change would have a significant effect on the radio allocations in the Denver area. It states that Arvada would be precluded from having a local broadcast facility due to the AM freeze, and that the absence of any technical changes in the proposal is incidental to the purposes of the freeze which should not have been waived to accept the KQXI application for filing. In addition, the petitioner alleges that the applicant showed no extraordinary circumstances to justify its waiver request, and that the application should be returned since it is substantially incomplete for failing to conduct a survey of community needs.

4. The petition for reconsideration was not timely filed and, therefore, cannot be considered. In any event the petitioner's contentions, in support of a reconsideration of our earlier action are unpersuasive. As stated in the Order being challenged, a grant of the proposal would have no effect on allocations since there are no engineering changes proposed and, therefore, it is not the type of proposal for which the "freeze" was designed. Furthermore, the application will not be returned as being substantially incomplete since the necessity of conducting a community needs survey, as noted below, is an essential point of contention. The applicant, in good faith, contends that a survey is not necessary, and the application is as complete as the applicant believes it should be. Accordingly, the petition for reconsideration will be dismissed, and the merits of the KQXI proposal will be considered.

5. Lakewood Broadcasting Service, Inc., licensee of station KLAK, Lakewood, Colorado, claims standing by arguing that a grant of the application will enhance KQXI's opportunities to compete effectively with KLAK for program sources, listeners and advertising revenues. KLAK states that both Lakewood and Arvada are separate suburban communities of the Denver metropolitan area; that KLAK and KQXI occupy adjacent channels and have sufficiently high power to be heard throughout the Denver urban area; that KQXI's move to Denver would confer additional commercial competitive advantages on KQXI; and that, therefore, KLAK has standing to object to a grant of the application. KLIR, Inc., licensee of station KLIR, Denver, Colorado, also claims standing. It argues that it is assigned to Denver, programs to the needs of Denver, draws advertising revenue from Denver, and that the reassignment of KQXI to Denver would have a direct adverse economic impact on KLIR.

6. The applicant claims that neither petitioner has standing as a party in interest. It states that KLAK cannot claim economic injury since the only licensed standard broadcast stations in suburban Jefferson County are KLAK and KQXI, and that KLAK would gain rather than lose listeners and advertisers by the removal to Denver of its only local competition. It argues that KLAK previously characterized KQXI as another Denver station and it cannot claim that a modification of KQXI's license to conform to that fact operates to KLAK's injury. In addition, the applicant contends that KLIR's case for standing is unsupported by any facts or affidavits and that it cannot be presumed that a modification of KQXI's license would cause economic injury to KLIR.

7. The Commission finds that the petitioners have standing as parties in interest within the meaning of section 309(d)(1) of the Communications Act of 1934, as amended, and section 1.580(i) of the Commission rules. A change in city of designation from a suburb to the larger city could affect the competitive position of the stations licensed either to the surrounding suburbs or the large city, and, accordingly, the petitioners have standing as parties in interest within the meaning of *Federal Communications Commission* v. *Sanders Brothers Radio Station*, 309 US 470, 9 RR 2008 (1940).

8. The KQXI application has been filed on the basis of the applicant's interpretation of prior Commission actions involving applications previously submitted by KQXI. To gain perspective on the proposal some background information, therefore, is necessary. In September 1961, KQXI requested authority to change transmitter site, increase daytime power, add nighttime, and make additional engineering changes. The application was designated for hearing to determine, *inter alia*, whether, for purposes of section 73.28(d)(3) of the rules (the "10% rule"), Arvada is a separate community from Denver, Colorado, and whether the nighttime proposal would be consistent with the Commission's coverage and separation requirements. The application was denied in a decision (*Denver Area Broadcasters*, 38 FCC 583, 4 RR 2d 895 (1965)), that concluded it was unnecessary to determine whether Arvada was a separate community entitling KQXI to the exception to the "10 percent rule." KQXI, however, was permitted to amend its application and return it to the processing line. As amended, the application sought authority to operate nighttime from a different site than that used for the daytime operation. Once again it was designated for hearing to determine whether, for purposes of section 73.28(d)(3), Arvada was a separate community from Denver and whether, as a consequence, the applicant met appropriate Commission requirements. In an initial decision, *Radio Station KQXI*, 13 FCC 2d 184 (1967), the Hearing Examiner favored a grant of the application and stated that Arvada was a separate community entitling KQXI to the first local nighttime service exception to the "10% rule" and that a grant of the application would be consistent with Commission requirements. The Review Board, however, modified this finding and denied the application (*Radio Station KQXI*, 13 FCC 2d 171, 13 RR 2d 363 (1968)). It held that, for the purposes of the "10% rule," Arvada was not a separate community from Denver and that the proposal would violate the rules. On January 19, 1969, FCC 69–36, the Commission denied, without opinion, KQXI's application for review of the Review Board's decision. In response, the applicant submitted an application to modify its license to specify Denver as its principal community, or, alternatively, reconsideration of the action denying its application for review of the Review Board's decision. By Order (FCC 69–304), the Commission dismissed the applicant's request. Since the tendered application, however, was still before the Commission, KQXI submitted a petition for acceptance, waiver and grant in which it sought waiver of the "freeze" and change in its city of designation. The Commission waived the "freeze" and accepted the application for filing. Now before the Commission is the KQXI application to change its city of designation from the suburban community of Arvada to the larger city of Denver and opposition and supplementary pleadings.

9. The petitioners, KLAK and KLIR, argue that the application be denied or designated for hearing on the basis of section 307(b) of the Communications Act of 1934, as amended. They argue that Arvada, a suburb of Denver, has grown in ten years from a population of 19,242 to 46,814 according to the recent census; that KQXI is the only standard broadcast station located in Arvada; that Commission rules do not

provide for an FM or TV allocation for Arvada; that Denver has 12 standard broadcast facilities, 10 FM, 6 television, 1 VHF educational television and 1 educational standard broadcast station; and that, therefore, section 307(b) of the Act requires an assessment, in hearing, of the relative needs of the two cities for locally originated radio service. The petitioners also claim that the Commission's Review Board ruling denying KQXI's earlier requests for authority to extend its operating hours from daytime to fulltime is not determinative of the questions posed by the current proposal. They state that the Review Board concluded that KQXI failed to establish that Arvada is a separate community from Denver within the meaning of the "10% rule" and that the Board was not confronted with a 307(b) determination. KLAK asserts that the Commission did not find that Arvada lacks the characteristics of a separate community for licensing purposes under section 73.30 of the rules or that Arvada does not have separate characteristics to warrant provisions in the Commission's allocation scheme for a separate local daytime broadcast station in the community. It contends, therefore, that KQXI cannot maintain that its proposal is required or justified by prior Commission action. KLIR argues that the Commission, for allocation purposes, continues to recognize former town and city limits and small suburban communities where there has been a merger or annexation by a large community of a smaller political entity, and, accordingly, since Arvada has not been merged or annexed by Denver, it remains a recognized entity for Commission purposes.

10. In submitting its application, KQXI states that it proposes to change its city of designation without altering its technical operation.[1] It contends that it seeks to conform the KQXI license to the Commission's recent action in which it affirmed the Review Board's decision that Arvada lacks separate programming needs. In response to the petitioners, the applicant asserts that its proposal is not contrary to section 307(b) of the Communications Act. It states that in 1960, the Commission authorized the facilities of KQXI and denied an application for Denver on the basis of the contingent comparative issue and not 307(b) since both applicants proposed wide area coverage to virtually the same area. At that time, according to KQXI, the Commission wrote that "the existing Denver stations or a station operating on the facilities here in contest . . . could effectively meet such distinctly local needs as exist in Arvada." *Denver Broadcasting Co.*, 28 FCC 662 at 676 (1960).[2] In addition, the applicant states that in 1969, the Commission refused to review the Review Board's decision that "KQXI failed to establish that Arvada is a separate community from Denver within the meaning of the 10 percent rule." On the basis of these two actions, KQXI asserts that it is in the anomalous position of being licensed to serve a "community which had been held—not once, but twice—to have no need for local service." The applicant states that it, therefore, submitted the instant application in order to conform its

[1] The present KQXI operation provides coverage to the city of Denver in accordance with Commission rules.

[2] The Commission did not find, however, that section 307(b) was not applicable, only that the decision should not be made on the basis of 307(b) considerations.

license to the Denver metropolitan area, the community which the Commission has twice found that it realistically serves. It adds that no change in the geographic emphasis of KQXI's programming is proposed in the light of the Board's conclusion in 1967 that "programming directed specifically toward Arvada residents on a regular basis is unimpressive, and . . . (that) the vast bulk of the programs described . . . are designed for . . . wide area appeal . . ." *Radio Station KQXI*, 13 FCC 2d at 178, 13 RR 2d 363 at 372 (1968). In response to KLAK's objections, KQXI argues that KLAK is bound by its contentions in Docket No. 14817 where it successfully contended that Arvada is a bedroom community dependent upon Denver for essential services, and that its destiny "is inextricably tied to that of Denver and the whole metropolitan area." In response to KLIR's contentions regarding the merger of separate political entities, KQXI alleges that the petitioner's reliance on these cases is misplaced since the Commission has found on two occasions that the needs of Arvada and Denver are common rather than separate and distinct.

11. A grant of KQXI's request would bring a twelfth local standard broadcast outlet to Denver while removing the only station licensed to serve Arvada, a city with a population of 46,814. There is, therefore, a substantial question as to whether a grant of this request would result in a fair, efficient, and equitable distribution of facilities within the meaning of section 307(b) of the Communications Act of 1934, as amended. *WKYR, Inc.*, 24 RR 1097 (1963), *Radio San Juan, Inc.*, 20 FCC 2d 92 (1969). The applicant argues that because the Commission has twice before held that Arvada was not a community, first in the original comparative proceeding, and later in a hearing on an application for nighttime service, we are now bound by those findings in this proceeding. That argument must be rejected. In the first proceeding the Commission held only that for the purpose of choosing between two applicants, one for Arvada and the other for Denver, the proposals were so similar in most respects that section 307(b) of the Act should not be controlling. In the second proceeding, although the issue was framed in terms of whether Arvada was a community for purposes of the 10 percent rule, the Review Board's conclusion was based on findings that KQXI was really trying to serve Denver nighttime, and, therefore, applied the criteria set forth in the Commission's *Policy Statement on Section 307(b) Considerations for Standard Broadcast Facilities Involving Suburban Communities*, 2 FCC 2d 190 (1965). Thus, neither of these earlier findings are controlling here, because different considerations are involved when, as here, the question is simply whether the only station licensed to Arvada should be allowed to be licensed to Denver, which already has eleven standard broadcast stations. See, for example, the special emphasis placed upon the city of license in the *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Therefore, an issue with respect to this matter will be specified.

12. KLIR argues also that KQXI violated section 1.65 of the rules by misrepresenting its program format to the Commission. It claims that KQXI's information on file at the Commission and that being distributed to potential advertisers are irreconcilable and that these

109-018—72——4

misrepresentations are the basis for an issue.[3] Specifically, the petitioner states that in June 1969 KQXI informed the Commission that it was changing its music format to country and western and in May 1970 that it was changing from country and western to gospel music. In July 1970, however, the petitioner states that KQXI distributed advertising promotions that claimed it was celebrating its first full year of broadcasting 100% religious music.

13. In reply, KQXI argues that, its assignment application filed July 14, 1969, and subsequent amendments state that there would be a "higher percentage of talk programs, including programs of a religious nature," that the station was "devoting as much as 40% of its weekly schedule to programming of a religious nature," and that the station had recently changed its music format to country and western. In a supplementary pleading, KQXI implies that there is no inconsistency between having a religious program format and a country and western music format, and states that the Commission was satisfied with its changes and explanation for them since the Commission subsequently granted its assignment application on September 24, 1969. It argues also that it notified the Commission by letter on May 28, 1970, that it changed its music format from country and western to gospel, and that, currently, it features both gospel and country and western music.

14. Upon consideration of the allegations of misrepresentation and the applicant's response thereto, we conclude that the petitioner has not alleged sufficient facts to warrant specifying an issue with respect to violation of section 1.65 of the rules. However, the contradictions between what KQXI reported to the Commission and what the station told potential advertisers are such as to raise a substantial question of misrepresentation. Therefore, we will specify an issue concerning the matter.

15. KLIR also contends that the applicant has failed to comply with the *Primer*[4] by not submitting a current community needs survey that includes the leaders and general public of Denver and by not justifying its 100% religious format. KQXI argues that a survey is not necessary since Arvada and Denver are indistinguishable broadcast entities and a survey of the people of Denver is irrelevant to the applicant's awareness of the needs of Denver and the surrounding area.

16. A survey of community needs was conducted by KQXI on December 8, 1970, and filed with its recent renewal application (BR–4102). KQXI satisfactorarily explained the changes in its broadcast format, and the station's renewal was granted. The petitioner's objections, therefore, relating to KQXI's past programming practices will not be considered further. The contention, however, that KQXI failed to comply with the *Primer* is well taken. The *Primer* states specifically that a community needs survey must be submitted with an application for modification of license to change station location. Since KQXI intends to be responsive primarily to Denver, with service to com-

[3] On the basis of statements made in these promotional fliers distributed by KQXI, KLIR claims that KQXI has completed the transfer of its identity to Denver and that there has been a de facto abandonment of Arvada. The statements made by KQXI for advertising purposes are insufficient to justify charging KQXI with unauthorized abandonment of Arvada, and an issue on that matter has not been specified.

[4] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971).

munities outside the city of license, it must be aware of the current problems, needs and interests of the residents of its community of license and the other areas it undertakes to serve. Accordingly, KQXI's response that it is aware of the needs of Arvada and that a survey of the people of Denver is irrelevant is inadequate, and an appropriate issue will be specified.

17. Finally, KLAK claims that a substantial question exists as to whether the applicant complied with the Commission's publication requirements. It asserts that KQXI published a notice in a newspaper in Denver but not in Arvada, and stated in the notice that the purpose of its application was to change the city of license to Denver, but failed to state that the main studio also would be moved to Denver. In response, the applicant argues that it was not necessary for it to publish in a newspaper and that the relocation of the main studio, which is a necessary consequence of the modification of license, was implicit in the notice that it published.

18. The Commission finds that the applicant complied with section 1.580 of the rules by broadcasting the notice as provided by the rules. The applicant, by also publishing the notice in a Denver newspaper, demonstrated its intention to fully apprise the public of the filing of its application, and the mere fact that KQXI failed to state that the main studio would be moved is not sufficient to raise a question as to whether the applicant has complied with section 1.580 of the rules.

19. Except as indicated by the issues specified below, the applicant is qualified to construct and operate as proposed. In view of the foregoing, however, the Commission is unable to make the statutory finding that a grant of the subject application would serve the public interest, convenience, and necessity, and is of the opinion that the application must be designated for hearing on the issues set forth below.

20. Accordingly, IT IS ORDERED, That, pursuant to section 309 (e) of the Communications Act of 1934, as amended, the application IS DESIGNATED FOR HEARING, at a time and place to be specified in a subsequent Order, upon the following issues:

1. To determine, in the light of section 307(b) of the Communications Act of 1934, as amended, whether a grant of the appplication would provide a fair, efficient, and equitable distribution of radio service.
2. To determine whether station KQXI misrepresented its program format to the Commission or in promotional material to potential advertisers, and, if so, whether such misrepresentation reflects adversely on its qualifications to be a broadcast licensee.
3. To determine the efforts made by station KQXI to ascertain the community needs and interests of the area to be served and the means by which the applicant proposes to meet those needs and interests.
4. To determine, in the light of the evidence adduced pursuant to the foregoing issues, whether a grant of the application would serve the public interest, convenience, and necessity.

21. IT IS FURTHER ORDERED, That the Petition for Reconsideration filed by KLIR, Inc., licensee of station KLIR, Denver, Colorado, IS DISMISSED.

22. IT IS FURTHER ORDERED, That the Petitions to Deny filed by KLIR, Inc., licensee of station KLIR, Denver, Colorado, and Lakewood Broadcasting Service, Inc., licensee of station KLAK, Lakewood,

Colorado, ARE GRANTED to the extent indicated above and ARE DENIED in all other respects.

23. IT IS FURTHER ORDERED, That KLIR, Inc., and Lakewood Broadcasting Service, Inc., ARE MADE PARTIES to the proceeding.

24. IT IS FURTHER ORDERED, That, in the event of a grant of the application, the construction permit shall contain the following condition:

The authority granted herein is subject to the condition that the licensee shall take whatever measures are necessary to prevent objectionable reradiation effects or cross-modulation with station KLZ, Denver, Colorado.

25. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the applicant and parties respondent herein, pursuant to section 1.221(c) of the Commission rules, in person or by attorney, shall, within 20 days of the mailing of this Order, file with the Commission in triplicate, a written appearance stating an intention to appear on the date fixed for the hearing and present evidence on the issues specified in this Order.

26. IT IS FURTHER ORDERED, That the applicant herein shall, pursuant to section 311(a)(2) of the Communications Act of 1934, as amended, and section 1.594 of the Commission rules, give notice of the hearing, within the time and in the manner prescribed in such rule, and shall advise the Commission of the publication of such notice as required by section 1.594(g) of the rules.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary*.

F.C.C. 72-1040

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PARTS 2 AND 89 TO ALLOCATE 157.450 MHz TO THE SPECIAL EMERGENCY RADIO SERVICE FOR MEDICAL PAGING SYSTEMS IN HOSPITALS Petition of General Systems Development Corporation for Allocation of the Frequency 157.450 MHz to the Business Radio Service for Marine Navigation System Use	Docket No. 19643 RM-1884

MEMORANDUM OPINION AND ORDER AND NOTICE OF PROPOSED RULE MAKING

(Adopted November 22, 1972; Released November 29, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON CONCURRING IN THE RESULT.

1. Notice is hereby given of the proposed rule making in the above entitled matter.

2. One of the rapidly growing uses of land-mobile frequencies utilizes the transmission of a series of audio tones to alert personnel carrying pocket size receivers. The messages may be merely an alerting call (tone-only page) or a tone selection signal followed by a voice message (tone-select, voice-page). The use of these devices has developed on land-mobile two-way frequencies and, due to the nature of paging requirements, these systems often create conflicts with two-way systems and result in complaints of destructive and annoying interference. In the Business Radio Service, for example, numerous interference problems and conflicts led to the designation of a number of frequencies exclusively for radio paging. The use of these paging-only channels markedly alleviated these difficulties.

3. For the past several years, we have also been receiving complaints of interference from paging systems to two-way systems in the Special Emergency Radio Service. Although attempts have been made to resolve these problems on a case-by-case basis, this approach to the problem has not been successful. As a result, during the past year the Commission has received several requests from individual hospitals and from the American Hospital Association for the allocation of a frequency solely for hospital paging communications. We have also received a petition from the Northern California Chapter of the Associated Public Safety Communications Officers (NCAPCO). NCAPCO's petition, filed on October 24, 1972, discusses the increasing

need for communications of the health care services in general, the interference problems resulting from operations of paging and two-way systems on the same frequencies, and recommends adoption of rules which would provide for authorizing paging and two-way systems on different frequencies.

4. We recently allocated four channels in the 35 and 43 MHz bands for one-way paging in the Special Emergency Radio Service. First Report and Order in Docket No. 19327 adopted June 14, 1972, FCC 72–508. While use of these frequencies should provide the capability of relieving interference on low VHF frequencies, we believe that an allocation somewhere near 150 MHz is required to correct the widespread interference problem between paging and two-way on 150 MHz frequencies and at the same time permit use of same-band equipment. We propose, therefore, to allocate 157.450 MHz to the Special Emergency Radio Service to meet hospital paging requirements for one-way paging.

5. The frequency 157.450 MHz is a bandedge (splinter) channel and is one of only two 150 MHz frequencies still unallocated for regular operations.[1] The frequency provides a 25 kHz channel between the Automobile Emergency Service and the Maritime Mobile Service allocations and is suitable for the paging activity. It is presently being sparsely used in the Land Transportation and Public Safety Radio Services under one-year developmental authorizations, almost entirely for railroad operations. The frequency is also being utilized by the General Systems Development Corporation (GSD) under an Experimental (Developmental) authorization. GSD is obtaining data in connection with a marine radio-navigation system it is developing, and it has petitioned (RM–1884) for rule making to allocate the frequency 157.450 MHz to the Business Radio Service for use as a data link in its system. GSD wants this specific allocation in order to provide a channel near the Maritime Mobile Service frequencies which affords the same equipment capabilities for both voice and "radio-aid-to-navigation" service. It is clear, however, that it will be a considerable period of time before the merits of GSD's system can be evaluated and the extent of the requirements for it ascertained. On the other hand, we are well aware that there is an immediate need for a frequency in this frequency range to meet the fast growing requirement for paging in hospitals and to ameliorate the severe interference problems rising out of the use of the same frequencies for paging and for two-way communications in the Special Emergency Radio Service. Finally, although we realize that the petitioner relies heavily on the allocation of this frequency for the development of its proposed system, our action here need not necessarily preclude it. The GSD system need not necessarily be tied exclusively to this frequency; so that when its merits and the requirements for its use are fully evaluated, other frequency possibilities in nearby frequency bands can be explored, assuming a case therefor can be made.

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[1] The other bandedge frequency is 159.480 MHz, but this frequency provides only a 15 kHz channel.

6. The proposed allocation of 157.450 MHz to the Special Emergency Radio Service requires that consideration be given to the possibility of adjacent channel interference. To minimize such interference, to permit duplication of use of this frequency to the maximum extent, and consistent with the power needs for hospital paging operations, we are proposing to limit the maximum effective radiated power (ERP) to 30 watts. Thirty watts ERP should accommodate most hospital needs for coverage over the hospital grounds. Accordingly, new hospital paging systems will be required to operate on a paging frequency effective with the availability of this 150 MHz channel. Existing systems, of course, will be permitted to continue operation, provided they do not cause harmful interference to two-way radiotelephone systems of other licensees sharing the same frequency in which case, they will be expected to change over to the new frequency. However, wide area hospital-to-doctor paging systems should not expect to utilize the frequency 157.450 MHz as limited to thirty watts ERP. Therefore, these higher power systems that cause interference to two-way systems will be required to change to one of the exclusive one-way paging frequencies available in the Business Radio Service. Alternatively, high or low power systems could elect to change to one of the lower band frequencies (35.64, 35.68, 43.64, and 43.68 MHz) available for one-way paging in the Special Emergency Radio Service.

7. Although we are proposing to allocate the frequency 157.450 MHz in the Special Emergency Radio Service primarily as a means of alleviating the problem of interference from paging to two-way systems, we want to explore other possibilities for dealing with it. Therefore, we invite comments on possible alternative methods, such as:

(a) reduction of authorized power and/or antenna height of hospital paging systems so as to limit the effective radiated power to the minimum required for effective coverage of the hospital buildings and nearby grounds (possibly 5 watts input into a ground plan antenna in the basement in lieu of 30 watts into an antenna on top of a building);

(b) require paging operators to monitor continually the channel before transmitting, in order to minimize interference to ongoing communications of other licensees;

(c) shift either the paging or the two-way system to a lesser congested channel when a serious interference situation develops; and,

(d) investigate the possibility of using 150 MHz tertiary frequencies for low-power in-hospital paging, without the mandatory geographical separation from adjacent channel operations as now required by the Rules.

Finally, we want to explore another matter. Since the frequency 157.450 MHz is one of the few narrow band edges remaining unallocated in the 150–160 MHz band, we invite comments on whether this frequency should be allocated to accommodate other, possibly more pressing needs.

8. In accordance with the foregoing, IT IS ORDERED That the petition, RM–1884, submitted by General Systems Development Corporation, IS DENIED IN PART, but final action thereon IS DEFERRED until further notice. IT IS FURTHER ORDERED That, Notice of Proposed Rule Making is given to amend Parts 2 and 89 of the Commission's Rules to allocate the frequency 157.450 MHz to the Special Emergency Radio Service for hospital medical paging.

9. The proposed amendments are issued pursuant to the authority contained in Sections 4(i) and 303(r) of the Communications Act of 1934, amended.

10. Pursuant to applicable procedures set forth in Section 1.415 of the Commission's Rules, interested persons may file comments on or before February 8, 1973, and reply comments on or before February 23, 1973. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision in this proceeding, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by the Notice.

11. In accordance with the provisions of Section 1.419 of the Commission's Rules, an original and 14 copies of all statements, briefs, or comments filed shall be furnished the Commission. Responses will be available for public inspection during regular business hours in the Commission's Public Reference Room at its main offices in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION.
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1029

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re MID-HUDSON CABLEVISION, INC. TOWN OF CATSKILL, N.Y. VILLAGE OF CATSKILL, N.Y. CITY OF HUDSON, N.Y. VILLAGE OF ATHENS, N.Y. TOWN OF ATHENS, N.Y. For Certificates of Compliance	CAC-89 CAC-90 CAC-91 CAC-92 CAC-93

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 21, 1972)

BY THE COMMISSION:

1. Mid-Hudson Cablevision, Inc., operates cable television systems at the Town and Village of Catskill, New York and intends to commence service at the City of Hudson, New York and the Village and Town of Athens, New York, small communities located within the Albany-Schenectady-Troy, New York television market, the 34th largest. It submitted applications for certificates of compliance, requesting the Commission's authorization to carry the following signals in all these communities:

WAST	(ABC)	Albany, N.Y.
WTEN	(CBS)	Albany, N.Y.
WRGB	(NBC)	Schenectady, N.Y.
WMHT	(Educ.)	Schenectady, N.Y.
WOR-TV	(Ind.)	New York City, N.Y.
WPIX	(Ind.)	New York City, N.Y.
WHCT	(Ind.)	Hartford, Conn.
WNEW-TV	(Ind.)	New York City, N.Y.
WCBS-TV	(CBS)	New York City, N.Y.

The carriage of WNEW-TV and WCBS-TV was proposed on a limited basis: (a) whenever the programming of WOR-TV, WPIX or WHCT is blacked out pursuant to the provision of the Commission's exclusivity rules, WNEW-TV would be substituted; (b) WNEW-TV would also be carried in that time before WHCT had commenced its daily broadcast service; (c) only the late-night (and early morning) non-network programming of WCBS-TV would be carried, at a time when no other stations were broadcasting. In addition to the broadcast signal carriage proposals, the applicant submitted

its plans to implement a non-broadcast access program as required by § 76.251 of the Rules.

2. These applications drew the opposition of Albany Television, Inc., licensee of WTEN and Sonderling Broadcasting Company, licensee of WAST. On May 22, 1972, the objection filed by Albany Television was dismissed as being untimely filed. Sonderling opposed the carriage of WNEW–TV on the basis proposed by Mid-Hudson; such carriage, it was asserted, violated the provisions of § 76.61(b)(2) as WNEW–TV did not qualify as the third independent this rule permits. Once WHCT had been selected [1], Mid-Hudson yielded somewhat, deleting its request to carry WCBS–TV; however, it refused to withdraw altogether the proposal to carry WNEW–TV on a "filler" basis when the programming of WOR–TV, WPIX or WHCT was blacked out. Faced by Albany Television's continued opposition, in the form of a Petition for Special Relief, Mid-Hudson withdrew its request to carry WNEW–TV when WHCT was not broadcasting.[2]

3. Our rules specifically permit the carriage of substituted programming obtained from "any other television station" when the exclusivity rules require the programming of regularly-carried independent stations to be blacked out. Rather than footnote the rule (§ 76.61(b)(2)(ii)), it appears advisable to quote it verbatim:

> (ii) Whenever, pursuant to Subpart F of this part, a cable television system is required to delete a television program on a signal carried pursuant to subdivision (i) of this subparagraph or paragraph (c) of this section, or a program on such a signal is primarily of local interest to the distant community (e.g., a local news or public affairs program), *such system may, consistent with the program exclusivity rules of Subpart F of this part, substitute a program from any other television broadcast station.* A program substituted may be carried to its completion, and the cable system need not return to its regularly carried signal until it can do so without interrupting a program already in progress. (Italics added.)

That the cable system has designated one particular station to provide such substituted programming is a matter for the system to decide. As a consequence, the opposition of Sonderling Broadcasting will be denied.

4. While there were no suggestions that the bulk of Mid-Hudson's signal carriage proposal or its stated access program was inconsistent with the cable television rules, we have examined them for consistency and conclude that the requirements of these rules have been satisfied.

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[1] § 76.61(b)(2) reads as follows:

> *Independent stations.* (i) For the first and second additional signals, if any, a cable television system may carry the signals of any independent television station: *Provided, however,* That if signals of stations in the first 25 major television markets (see § 76.51(a)) are carried pursuant to this subparagraph, such signals shall be taken from one or both of the two closest such markets, where such signals are available. If a third additional signal may be carried, a system shall carry the signal of any independent UHF television station located within 200 air miles of the reference point for the community of the system (see § 76.53), or if there is no such station, either the signal of any independent VHF television station located within 200 air miles of the reference point for the community of the system, or the signal of any independent UHF television station.

[2] As a consequence, these Petitions for Special Relief (CSR–115, 116, 117, 118, and 119), styled "Motion for Acceptance of Late Pleading" (CSR–115, 116, 117, 118, and 119) have been rendered moot.

Accordingly, IT IS ORDERED, That the subject applications for Certificates of Compliance filed by Mid-Hudson Cablevision, Inc., are granted.

IT IS FURTHER ORDERED, That the opposition submitted May 15, 1972, by Sonderling Broadcasting Corporation is denied.

IT IS FURTHER ORDERED, That the "Motions for Late Pleading", filed by Albany Television, Inc., are dismissed.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1053

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of PAPPAS TELEVISION, INC. (KMPH), TULARE, CALIF. For License to Cover Construction Permit	File No. BLCT-2135

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 29, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has for consideration (a) the above-captioned license application filed on October 6, 1971, by Pappas Television, Incorporated, permittee of television broadcast station KMPH, channel 26, Tulare, California; (b) an informal objection filed on November 23, 1971, by the Organization for Utilizing and Reforming Television; and (c) related pleadings.[1]

2. On November 6, 1968, the Commission granted a construction permit (BPCT-4050) to Pappas Electronics, Inc., for a new television broadcast station to operate on channel 26, Tulare, California. On January 20, 1970, the Commission granted an application (BAPCT-468) to assign the construction permit to Pappas Television, Inc. (Pappas), and an application (BMPCT-7196) for modification of the construction permit and to make changes in the station's authorized facilities. On October 6, 1971, Pappas filed this license application for television broadcast station KMPH, channel 26, Tulare, California. On November 23, 1971, the Organization for Utilizing and Reforming Television (OUR-TV) filed an informal objection to Pappas' license application.

3. OUR-TV, a coalition of individuals and organizations formed to assure that programming in the San Joaquin Valley adequately reflects the needs and interests of low income and minority groups, alleges that Pappas has failed in its efforts to ascertain the needs and interests of the community, and that the Commission should designate Pappas' license application for hearing on an appropriate issue. OUR-TV contends that Pappas' initial survey, conducted in 1968, as part of its application for a construction permit, was deficient, since it was not conducted by key personnel; since it failed to list a detailed compositional breakdown of the community; since it did not fully advise the person interviewed of the purpose for the interview; and since it was not representative of the minority and poor population

[1] On December 16, 1971, and April 3, 1972, the Organization for Utilizing and Reforming Television filed amendments to its informal objection. On January 24, 1972, Pappas Television, Inc., filed an opposition, and on May 23, 1972, Pappas filed further comments.

of the community. OUR–TV further contends that Pappas failed to conduct any survey in conjunction with its modification application (BMPCT–7196) filed on May 5, 1970, and that the survey conducted in 1970 as part of Pappas' assignment application (BAPCT–468) was deficient because it did not cover areas beyond Tulare and Kings Counties and failed to list specific program proposals.

4. OUR–TV's allegations of deficiencies in Pappas' 1968 survey are based upon the standards set forth in the Commission's *Primer on Ascertainment of Community Problems by Broadcast Applicants*, adopted February 18, 1971, 27 FCC 2d 650, and not upon the survey requirements which were operative in 1968. The requirement that only principals, top-level employees or prospective employees could conduct the consultations with the community leaders was not operative until the Commission's *Notice of Inquiry in the Matter of the Primer on the Ascertainment of Community Problems by Broadcast Applicants*, was adopted December 9, 1969, 20 FCC 2d 880. Under the 1968 survey standards, as set forth in *Minshall Broadcasting Co.*, 11 FCC 2d 796 (1968), it was acceptable for Pappas to have its survey conducted by Thomas Porter, an instructor at the College of Sequoias in Visalia, California. Similarly, the 1968 standards did not require the broadcast applicant to submit a compositional breakdown of the community. A review of the questions contained in Pappas' 1968 survey indicates that persons interviewed must have been aware of the purpose of the survey. With regard to OUR–TV's allegation that the 1968 survey was not representative of the minority and the poor population, Mr. Porter stated that he had difficulty interviewing various labor and minority officials and discovered that questionnaires left with these officials were not returned. The survey did, however, contact 217 persons and contained complete and responsive answers concerning local needs, full information as to steps taken to become informed, suggestions received and an evaluation of those suggestions, and a list of proposed programming to meet those suggestions. The 1968 survey therefore, fully complied with *Minshall Broadcasting Co.*, *supra*.

5. On May 5, 1970, Pappas filed both a modification application (BMPCT–7196) and an assignment application (BAPCT–468). In connection with both applications, Pappas, on December 1, 1970, submitted a survey to ascertain the needs and interests of the community. Pappas' modification application stated that although the coverage area of station KMPH–TV would be enlarged, it did not expect to serve an increased number of persons.[2] Pappas has also submitted a news release dated May 10, 1971, stating that it was not the station's intention to serve the communities of Fresno and Bakersfield. Although question 8 of the Commission's proposed primer[3] required applicants for major changes in facilities to ascertain the needs in the gain area the applicant proposes to serve, Pappas did not have to survey areas outside Tulare and Kings Counties, since it never intended to serve the outlying areas. With regard to the allegation that

[2] Exhibit 2 of modification application (BMPCT–7196) filed on May 5, 1970.
[3] *Notice of Inquiry in the Matter of the Primer on Ascertainment of Community Problems by Broadcast Applicants*, adopted December 19, 1969, 20 FCC 2d 880.

the 1970 survey failed to list proposed programming, it must be noted that Exhibit III to the 1970 survey did specifically list panel shows, special reports, local news broadcasts and editorials directed to the problems of the community. The Commission finds that although this list might have expressed greater detail, it did comply with questions 30 and 33 of the proposed primer.

6. Based on the foregoing, it is clear that OUR–TV's allegations do not raise substantial and material questions of fact requiring designation of the license application for hearing. The real dispute between the parties revolves around OUR–TV's concept of a station's obligation to the community and how that obligation is to be met. The controversy stems from a rejection by KMPH of a list of demands submitted to it by OUR–TV in the form of a proposed agreement. From this rejection have come charges and countercharges of bad faith negotiations, harassment, threats, but nothing in the way of facts of which this Commission may take cognizance. The proposed agreement is extensive but a brief summary of its more important features will serve to illumine the dispute.

7. The agreement provides that the seven-man steering committee of OUR–TV be recognized by KMPH as the exclusive agent for the minority community. It also provides that the steering committee shall have the power to hire and fire minority employees; that the station will hire specified numbers of minority personnel to be selected by OUR–TV; that those selected, even if not qualified, shall be trained to meet qualifications; that the station will maintain a continuous work-training program, will pay the trainees who shall be selected by OUR and will upon completion of training, replace regular employees performing the tasks. The agreement also specifies that there shall be no hiring of Mexican nationals or of Spanish-surnamed persons who live outside the KMPH service area. Other demands require the station to supply a complete list of all companies with which it does business and the affirmative action programs of these companies. KMPH, pursuant to the proposed agreement, would be required to fund training programs initiated by the minority community and to make its production facilities available for such programs. Moreover, a one-hour program to be produced by the minority community and directed by OUR–TV shall be presented bi-monthly in prime time. The costs for the production shall be paid for by KMPH, up to $2,000 per month, but the exclusive rights to these productions shall remain with OUR–TV.

8. KMPH argues that to submit to such demands would be tantamount to relinquishing control of its station to OUR–TV, and an unlawful delegation of licensee responsibility. Therefore, although stating a willingness to meet and discuss proposed programming, KMPH has refused to agree to the OUR–TV demands. With respect to minority employment, the most recent information submitted indicates that the station has 25 employees, 5 of whom are Mexican-Americans. Three of these are in production jobs and two are in clerical jobs. With respect to programming, KMPH programs some five hours per week in Spanish. It also broadcasts a Japanese program, produced

by two Japanese-American employees, a Japanese husband and wife team.

9. On the basis of all of the foregoing, we believe that the OUR–TV petition should be denied and the pending application of KMPH for license should be granted. We find that the community surveys made in 1968 and 1970 were in substantial compliance with the Commission's policies when they were made, and that none of the other questions raised by OUR–TV concerning the hiring practices of the station or its programming are such as to constitute causes or circumstances first coming to the Commission's attention since grant of the construction permit for the station warranting a hearing under section 319(c) of the Communications Act. It is noteworthy that, although KMPH has now been operating for over a year, OUR–TV has offered no specific complaints with respect to either programming or hiring practices. Furthermore, if OUR–TV continues to be concerned as to whether station KMPH is providing a needed service and whether the station is being responsive to the problems of the community, it will have ample opportunity to raise objections at the next renewal period. In the meantime OUR–TV can continue to meet with KMPH and provide input to KMPH as to problems of the minorities in the communities.

Accordingly, IT IS ORDERED, That the application (BLCT–2135) filed by Pappas Television, Incorporated, IS GRANTED, and the informal objections filed by the Organization for Utilizing and Reforming Television ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Commissioners Statements Concerning Commission Action of October 27, 1972 on Pennsylvania and Delaware Broadcasting Stations Renewals

NOVEMBER 3, 1972.

OPINIONS BY COMMISSIONERS NICHOLAS JOHNSON AND HOOKS IN PENNSYLVANIA-DELAWARE RENEWAL ACTION

On October 27, 1972, the Commission announced action on renewal applications of 28 Pennsylvania and two Delaware broadcasting stations, which the Commission had queried on employment practices.

Commissioners Nicholas Johnson and Hooks concurring in part and dissenting in part to the Commission action, and has now issued the following statements:

OPINION OF COMMISSIONER NICHOLAS JOHNSON CONCURRING IN PART AND DISSENTING IN PART

Some four years after the enactment of the Civil Rights Act of 1964, the Federal Communications Commission promulgated equal employment opportunity regulations of broadcasters. *Nondiscrimination Employment Practices of Broadcast Licensees*, 13 FCC 2d 766 (1968); *Nondiscrimination Employment Practices of Broadcast Licensees*, 18 FCC 2d 240 (1969); *Nondiscrimination Employment Practices of Broadcast Licensees*, 23 FCC 2d 430 (1970).

By August of 1972, the Commission finally decided it ought to make an effort to enforce those regulations. *See Pennsylvania and Delaware Renewals*, ——— FCC 2d ——— (1972).

In light of today's action—some eight years after the Civil Rights Act—the majority's effort has proved to be, at best, tokenism.

In our August decision, we directed the Broadcast Bureau to send equal employment opportunity inquiry letters to 30 broadcast stations in Pennsylvania and Delaware. Those letters were directed to stations which had ten or more employees and which:

(1) had no women employees, or showed a decline in the number of women employees from 1971 to 1972, or

(2) were in areas with a minority population of 5% or more and employed no blacks or showed a decline in the number of black employees from 1971 to 1972.

The purpose of these letters was to solicit from the stations their reasons for their employment patterns—to help us determine whether

the stations might be engaged in the sort of discriminatory employment practices against which our regulations are directed.

I had considerable reservations about the standards employed by the Commission in selecting stations which merited letters of inquiry. See my concurring and dissenting statement in the *Pennsylvania and Delaware Renewals* decision, ——— FCC 2d ——— at ———. I felt that those letters—the sole purpose of which was informative rather than punitive—should have been sent to many more stations, that we should have concerned ourselves not only with the number of women and minorities employed by a station, but also with the *positions* held by such employees.

The majority, of course, felt otherwise, and I concurred in their gesture on the theory that *some* remedial action is generally preferable to none at all. Insofar as this proceeding is concerned, however, I have serious doubts about the validity of that theory. For though it appears to have scrutinized the employment practices of these stations, the majority has, in fact, emphasized form over substance.

The stations to which inquiries were directed have responded. Predictably, virtually all of them have denied any discriminatory practices. Somewhat dubious about what all this has accomplished, the majority issues outright renewals to 14 of the 30 stations. It renews four more with the direction that they should inform the Commission regarding implementation of their EEO programs. It takes no action with respect to eight stations the renewals of which are being challenged by petitions to deny. And it defers the renewals of four other stations the initial responses of which it considers inadequate.

The majority grants these renewals, not because it is convinced that these stations have not engaged in discriminatory employment practices, but because *it does not know what else to do.* One wonders why, at this late date—eight years after passage of the Civil Rights Act of 1964—the Federal Communications Commission has not yet figured out how to prevent unlawful discrimination by our licensees. One reason, of course, is that until now it has not even tried.

But one can also fairly ask, why, in the absence of a program to prevent discriminatory practices, the Commission simply throws up its hands and grants these stations their license renewals. I would have thought that if we are not to put them in hearing we would, at the very most, grant short-term renewals until we could arrive at some intelligent approach. Instead, we send out letters of inquiry based on hard data which obviously evokes our suspicion, only to accept—in toto—the facile responses of the stations.

Perhaps even more serious is the majority's rather cavalier determination not to designate for hearing even the single station which has failed to satisfy us of its lack of discriminatory conduct. The Commissioners concede that there may well be a reason to believe that WNPV has discriminated against women. WNPV admitted, in its response to our inquiry, that—notwithstanding its low percentage of women employees—it had advertised in *Broadcasting Magazine* for an announcer with the specification that all applicants must be male! Can we imagine the justifiable indignation if it had advertised "only white folk need apply"? What's the difference—except that one ad is

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racist and the other is sexist? The law covers both—even though many of the white male establishment are still guffawing over their "women's liberation" jokes. In view of this unabashed concession, I would have thought that a hearing would be in order.

The majority, however, does not like hearings. Though such hearings may be the only means of properly determining the facts in a given case, this Commission views hearings as punitive. As a result, we normally make our renewal decisions in a factual vacuum. This proceeding is an excellent example of that phenomenon.

Though our Broadcast Bureau has some reservations about continuing our letter of inquiry program with respect to future renewals, the majority—largely at the request of Commissioner Benjamin Hooks, the FCC's first black Commissioner—has agreed at least to make EEO inquiries of several stations in Washington, D.C., Maryland, Virginia, and West Virginia. I concur in that part of the majority's decision because I still believe that the very fact of these letters may achieve some, very minimal, needed results. For example, WNPV—whose apparent indifference to sex discrimination is matched by an indifference to minority groups employment as well—claims to have initiated an affirmative action program for recruiting minority applicants as the result of our letter of inquiry.

My disagreement lies in the majority's refusal to put teeth into its equal employment opportunity policies. Hopefully, Commissioner Hooks will be able to rectify this situation as the FCC considers a more adequate EEO program for, as always, "the future." Meanwhile, our current policy is, in general, a joke.

STATEMENT OF COMMISSIONER BENJAMIN L. HOOKS, CONCURRING IN PART; DISSENTING IN PART

In Re: Renewal of Broadcast Licenses in Pennsylvania and Delaware

By deferring further the renewal of several broadcast station licenses pending a deeper review of their Equal Employment Opportunity programs, the Commission is reasserting its commitment to better minority hiring practices. Careful scrutiny of licensee practices in this area elevates the consciousness level on the subject and I believe that the deferral letter approach has been salutory in that respect. It has also identified pockets where more attention is needed.[1]

My only qualm is that, in addition to those four licensees whose renewals remain in abeyance, I would have included a number of other stations whose surface responses did not seem to me to reflect more than token compliance over the past three years.

While license renewal deferrals may not be the ideal way in which to approach or implement the Commission's EEO rules and policies, I must consider meritorious any measure taken by the Commission evincing sincerity in the matter of nondiscrimination until we adopt a systematic method to deal with this issue on a day-to-day basis so as to avert a renewal crunch.

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[1] The situation in York, Pennsylvania, is an excellent example of a glaringly troublesome state of affairs brought to light by this deferral exercise. The responses submitted by six York broadcast stations with a combined workforce of 91, in a city that is 13% Black, indicate 0 Black broadcast employees.

F.C.C. 72-1033

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST BY STATION WQXI-TV, ATLANTA, GA., FOR "ONE-TIME" WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658(k)), THANKSGIVING DAY, NOVEMBER 23.

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 21, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING; COMMISSIONER H. REX LEE CONCURRING IN RESULT.

1. The Commission here considers a letter request (dated November 6, received November 8, 1972) for waiver of the "prime time access rule" with respect to the presentation of ABC network news on Thanksgiving Day, November 23, 1972, which was filed by Pacific and Southern Broadcasting Co., Inc., on behalf of its Station WQXI-TV, Atlanta, Georgia, ABC-affiliated. This station seeks permission to present, during prime time, a half-hour of ABC network news at 7 p.m. E.T., in addition to three hours of ABC football starting at 8 p.m.

2. It appears from the letter that ABC will present an NCAA football double-header, the first game likely to run until about 7 E.T., and the second from 8 to about 11 E.T. If WQXI presents the earlier football game, it cannot run the network news till about 7 p.m., and, if it presents the news then plus the later football game, this would be a half-hour more than the 3 hours of network prime time per evening permitted under the rule. Therefore, waiver is sought.

3. It does not appear completely clear that ABC will in fact present network news that evening. However, if it does, it appears that waiver is warranted to permit the broadcast of such material, involving coverage of national news developments, in addition to the sporting events. Therefore waiver is granted herein.

4. However, it should be emphasized that waiver is granted only in view of the rather unique "one-time" circumstances here, where a mid-week holiday with important sports events is involved. Grant here should not be taken to indicate that waiver will be granted in other circumstances which might involve a greater number of occasions, such as weekend sports events.

5. Accordingly, IT IS ORDERED, That Station WQXI-TV, Atlanta, Georgia MAY PRESENT, during prime time, Thursday, November 23, 1972, up to 3½ hours of network programming during prime time, provided that a half-hour of it is network news.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1034

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
REQUEST FOR "ONE-TIME" WAIVER OF THE PRIME TIME ACCESS RULE (SECTION 73.658 (k)) FILED ON BEHALF OF STATION KMGH-TV, DENVER, COLO., FOR NOVEMBER 25, 1972

MEMORANDUM OPINION AND ORDER

(Adopted November 15, 1972; Released November 21, 1972)

BY THE COMMISSION: COMMISSIONERS JOHNSON AND H. REX LEE DISSENTING.

1. The Commission here considers a letter request for "one-time" waiver of the prime time access rule (Section 73.658(k) of the Commission's Rules) filed on November 14, 1972, by McGraw-Hill Broadcasting Company, Inc., on behalf of its Station KMGH-TV, Denver, Colorado, CBS-affiliated. The request concerns Saturday, November 25, 1972.

2. On that evening, the CBS network will present two hours of its regular network programs, from 8 to 10 p.m. E.T. or 6 to 8 p.m. M.T., followed by the 90-minute "Miss Teenage America" program. The latter will run from 10 to 11:30 p.m. E.T., or 8 to 9:30 p.m. M.T., since it is presented live and simultaneously throughout the United States. In the Eastern and Central portions of the United States, the 3½ hours of network programming thus involved does not present any problem, since the excess over three hours occurs after the end of prime time (11 p.m. E.T., 10 p.m. C.T.). However, in the Mountain zone, where the prime hours are 6 to 10 M.T., a problem is presented, since all of this 3½ hours occurs during prime time, exceeding the three hours of permissible network programs during prime time each evening permitted by the rule. Therefore, waiver is requested to present 3½ hours of network programs in Denver on this one evening.

3. We have previously considered, and granted, requests involving similar considerations: an evening network program schedule involving simultaneous programming throughout the United States and complying with the rule in the Eastern and Central zones, where over 80% of the TV homes in the top 50 markets are located, but exceeding the permissible limit in the Mountain zone. Waiver has been granted in recognition of the special problems created for "top 50 market" stations in the Western portion of the United States, where they must fit simultaneous network evening programming into their schedules. See,

for example, *National Broadcasting Company, Inc.*, 33 FCC 2d 743, involving the "Academy Awards" and "Miss America" telecasts.

4. The present situation falls within the principle of these decisions, and accordingly waiver in the present case appears appropriate.

5. Accordingly, IT IS ORDERED, That Station KMGH–TV, Denver, Colorado, MAY PRESENT, up to 3½ hours of CBS programming on the evening of November 25, 1972.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

F.C.C. 72-1042

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PART 81 OF THE RULES CONCERNING EXEMPTION FROM THE 156.8 MHz WATCH REQUIREMENTS BY LIMITED COAST STATIONS AT TEMPORARY LOCATIONS

ORDER

(Adopted November 22, 1972; Released November 29, 1972)

BY THE COMMISSION:

1. Section 81.191(d) of the rules now provides that all limited coast stations, other than marine utility stations, are required to maintain a watch on 156.8 MHz during their hours of service. This watch requirement became effective March 1, 1969.

2. The Commission has now had three years to evaluate the contribution of all types of limited coast stations to the VHF safety system. Limited coast stations at temporary locations are generally installed in vehicles or are hand carried. These stations usually operate in port areas where there is adequate coverage by other stations or in remote areas where there is little or no boating activity. These stations are of negligible value to the safety system, and to require them to maintain this watch is unreasonable.

3. In view of the foregoing, it is our policy that limited coast stations operating at temporary locations be relieved of the requirement to maintain a watch on 156.8 MHz and we have granted exemptions where licensees have individually requested exemptions. There is now a need to incorporate this policy in our rules, as set forth in the attached Appendix.

4. Since this rule change is a general statement of an existing policy and involves a question of no public impact, we find that a notice of proposed rule making is unnecessary. Authority for promulgation of this amendment is contained in Sections 4(i) and 303(r) of the Communications Act of 1934, as amended.

5. Accordingly, IT IS ORDERED, effective December 8, 1972 that Part 81 of the Rules and Regulations IS AMENDED as set forth in the attached Appendix.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 81, Stations on Land in the Maritime Services and Alaska-Public Fixed Stations is amended as follows:

1. Section 81.191(d)(1) is amended to read as follows:

§ 81.191 radiotelephone watches by coast stations.

* * * * * * *

(d) * * *

(1) Each limited coast station at fixed location licensed to transmit by telephony in the band 156–162 MHz, shall during its hours of service, maintain an efficient watch for reception of F3 emission on 156.800 MHz, whenever such station is not being used for transmission.

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F.C.C. 72-1041

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of
AMENDMENT OF PARTS 81 AND 83 OF THE RULES CONCERNING EXEMPTIONS FROM LISTENING WATCHES BY LIMITED COAST STATIONS AND THE USE OF VHF RADIO INSTALLATIONS ON COMPULSORY EQUIPPED VESSELS

ORDER

(Adopted November 22, 1972; Released November 29, 1972)

BY THE COMMISSION:

1. Section 83.514 of the rules provides that when a vessel is navigated not more than 20 nautical miles from a public coast or United States Coast Guard station it may use a very high frequency (VHF) radiotelephone instead of a medium frequency (MF) radiotelephone for compliance with Title III, Part III of the Communications Act. The 20 nautical mile provision in the rules was adopted because it represents the minimum coverage area usually provided by VHF coast stations. This item will add a provision to the rule that if a vessel exceeds this 20 nautical mile limit but remains within VHF communication range it may request a specific exemption to use VHF instead of MF.

2. In Section 81.191(d)(2) of the rules we provide that the coverage of a government VHF station will be assumed to be 15 nautical miles, or as stated by competent authorities. The Commission when considering a request for exemption based on coverage by a government station, as a matter of practice, always considers the coverage area as stated by the cognizant authority i.e., Coast Guard or Army Engineer. To make the rule consistent with our practice, the 15 mile provision in Section 81.191(d)(2) should be deleted.

3. We find that notice of proposed rule making is unnecessary because the amendments are either editorial or so minor and noncontroversial that no substantial comment could be expected. Authority for promulgation of this amendment is contained in Section 4(i), and 303(r) of the Communications Act of 1934, as amended.

4. Accordingly, IT IS ORDERED, effective December 8, 1972 that Parts 81 and 83 of the Rules and Regulations ARE AMENDED, as set forth in the Appendix attached hereto.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Parts 81 and 83 Sections in the Maritime Mobile Services, are amended as follows:

1. Section 81.191(d)(2) is amended to read as follows:

§ 81.191 Radiotelephone watch by coast stations.

* * * * * * *

(d) * * *

(2) The Commission may exempt any limited coast station from compliance with sub-paragraph (1) of this paragraph when it has been demonstrated that the watch on 156.800 MHz is complete over the service area of the coast station by public coast stations or United States government stations having continuous hours of service. An application for exemption must include a chart showing the receiving service area of the limited coast station by the method specified in Subpart R of this Part of the rules. The applicant shall indicate on the same chart the location by coordinates, to the nearest minute, and the receiving service area of the public coast station or government station maintaining the continuous watch on 156.800 MHz. The receiving service area of these stations shall be calculated using the criteria specified in Subpart R of this Part of the rules, or in the absence of such engineering study, the receiving service area of public coast stations will be assumed to have a radius of 20 nautical miles, and that of government stations as stated by competent authorities of the agency concerned; e.g. District Commander for the U.S. Coast Guard, District Engineer for the U.S. Army. If a Coast Guard station is used as a basis for exemption, the filing must include information from the District Commander of the geographical area concerned showing: (i) the coordinates of the station; (ii) the receiving area of service of the station; (iii) whether the station maintains a continuous listening watch on 156.8 MHz; and (iv) the District Commander's position, if any, on whether the exemption should be granted. The receiving area of service of the Coast Guard station will be plotted by the applicant on the chart referred to in this paragraph.

* * * * * * *

2. Section 83.514(a) is redesignated (a)(1) and new subparagraph (2) added.

§ 83.514 Radiotelephone installation.

* * * * * * *

(2) An exemption from the band 1605 to 2850 kHz installation requirements may be granted for a vessel that is navigated within the communication range of a VHF public coast or Coast Guard station, but beyond the 20 nautical mile limitation specified in subparagraph (1) above, provided the vessel is equipped with a transmitter and received capable of effective transmission and reception of F3 emission within the band 156 to 162 MHz. An application for exemption must include a chart showing the route of the voyage or the area of operation of the vessel, and the receiving service area of the VHF public coast or Coast Guard station. The coverage area of the Coast Guard station shall be based on written information from the District Commander, U.S. Coast Guard, a copy of which must be furnished with the application. The coverage area of a public coast station shall be computed by the method specified in Subpart R of Part 81 of the Rules.

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F.C.C. 72-1013

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 83 CONCERNING REQUIREMENTS FOR TWO RECEIVERS ON BOARD VESSELS LICENSED IN THE 156–162 MHz BAND	Docket No. 19543

REPORT AND ORDER

(Adopted November 15, 1972; Released November 17, 1972)

BY THE COMMISSION: COMMISSIONER H. REX LEE CONCURRING IN THE RESULT; COMMISSIONER REID ABSENT.

1. A Notice of Proposed Rule Making in the above captioned matter was adopted on July 12, 1972, and was published in the Federal Register on July 20, 1972 (37FR14409). The dates for filing comments and reply comments have passed.

2. In that Notice, we proposed to amend Part 83 by deleting the requirement for ship stations to maintain a "watch" on the distress, safety and calling frequency 156.800 MHz when the station is being used for transmission on that frequency, or for communications on another channel in the 156–162 MHz band.

3. Comments were filed by: North Pacific Marine Radio Council; Southern California Marine Radio Council; the Dillinham Corporation; and the Central Committee on Communication Facilities of the American Petroleum Institute (Central Committee).

4. All of the above parties fully supported the proposal as set forth in the Appendix to our Notice and urged its adoption.

5. The Central Committee, in addition to supporting our proposal, has suggested that the Commission should at a later date consider a similar amendment of Section 81.191(d) which requires that the operator of a coast station stand an effective "watch" on the frequency 156.800 MHz even while simultaneously exchanging communications on another frequency in the VHF band. We believe the operational circumstances of coast stations are substantially different from ship stations which operate on the high seas, in a more noisy environment, often in severely adverse weather and usually with restricted numbers of operators. Coast stations ordinarily are permanently located in weatherized shore installations chosen by the licensee and in times of emergency or peak traffic can more easily have station operating personnel augmented. We also believe that it is especially desirable for a coast station to maintain a watch on the distress frequency at least while receiving on a working frequency because the coast station is

more likely to engage in extensive and protracted exchanges of communications on a working frequency during which time without our present requirements there would be no watch at all on the distress frequency. For these reasons we are not considering comparable rule changes for limited coast stations.

6. As an ancilliary matter, the term continuous and efficient watch as used in Section 83.207 needs clarification. Accordingly, an explanatory note has been added to this section to the effect that the requirement for a continuous and efficient watch is not violated when the receiver being used for the watch is temporarily rendered inoperative due to transmissions by the ship station.

7. In view of the foregoing, IT IS ORDERED, that pursuant to the authority contained in Section 4(i), and 303(f) and (r) of the Communications Act of 1934, as amended, Part 83 of the Commission's rules IS AMENDED, effective December 28, 1972, as set forth in the attached Appendix.

8. IT IS FURTHER ORDERED, That the preceding in Docket 19543 IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX

Part 83 of Chapter 1 of Title 47 of the Code of Federal Regulations is amended as follows:

§ 83.207 [Amended]

1. Section 83.207 is amended by adding a note to read as follows:

NOTE: Automatic muting of the watch receiver during the brief periods when the VHF equipment is transmitting authorized traffic is not considered as interrupting the continuity or lowering the efficiency of the required watch.

2. Section 83.224 is amended, and the footnote deleted to read as follows:

§ 83.224 Watch on 156.800 MHz.

Each ship station, or, if more than one maritime mobile station is being operated from a vessel, then at least one station licensed to transmit by telephony on one or more frequencies within the band 156–162 MHz shall, during its hours of service for telephony in this band, maintain an efficient watch for the reception of F3 emissions on the frequency 156.800 MHz whenever such station is not being used for transmission on that frequency, or for communication on other frequencies in this band: *Provided, however,* That ship stations operating under the provisions of § 83.106(b)(5) or the note to § 83.106 of the rules are exempt from the watch requirements on 156.800 MHz.

F.C.C. 72R-333

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of	
SALEM BROADCASTING CO., INC., SALEM, N.H.	Docket No. 19434 File No. BP-18325
NEW HAMPSHIRE BROADCASTING CORP., SALEM, N.H.	Docket No. 19435 File No. BP-18479
SPACETOWN BROADCASTING CORP., WEST DERRY, N.H.	Docket No. 19436 File No. BP-18492
For Construction Permits	

MEMORANDUM OPINION AND ORDER

(Adopted November 20, 1972; Released November 22, 1972)

BY THE REVIEW BOARD: BOARD MEMBER KESSLER ABSENT.

1. This proceeding, involving the mutually exclusive applications of Salem Broadcasting Co., Inc. (Salem), New Hampshire Broadcasting Corporation (New Hampshire) and Spacetown Broadcasting Corporation (Spacetown), for new standard broadcast stations was designated for hearing by Commission Memorandum Opinion and Order, FCC 72-136, 33 FCC 2d 672, released February 15, 1972. Among the six issues specified were a *Suburban* issue against Spacetown, a limited financial issue against Salem, a 307(b) issue, and a contingent comparative issue. Presently before the Review Board are: (a) a motion to enlarge issues, filed March 13, 1972, by Spacetown; (b) a petition to enlarge issues, filed March 13, 1972, by New Hampshire; and (c) a petition to enlarge issues, filed May 10, 1972, by New Hampshire.[1] Spacetown's petition seeks the addition of nineteen (19) issues against Salem and New Hampshire, including issues concerning Section 73.37 prohibited overlap, 307(b) Suburban Community, site availability, Section 1.65, *Suburban* and financial qualifications. In addition, Spacetown requests a misrepresentation issue against Salem, and a real party-in-interest issue against New Hampshire. New Hampshire's petitions request site availability and financial issues against Salem. For the sake of clarity, the Board will discuss the issues in sequence.

SECTION 73.37 ISSUES—PROHIBITED OVERLAP

2. Spacetown first requests four issues to determine whether the applications of Salem and New Hampshire violate Section 73.37 of the Commission's Rules, and, if so, whether the applications should be dismissed. Spacetown alleges that the proposed 0.5 mv/m contours of both applicants' proposed stations will overlap the 0.025 mv/m

[1] See the attached Appendix for a complete list of the numerous related pleadings.

contour of standard broadcast Station WHIM, Providence, Rhode Island, in violation of Section 73.37. Spacetown further alleges that neither application falls within the exceptions to the prohibited overlap rule in Section 73.37(b) [2] because, as reflected by the 1970 U.S. Census figures, Salem, New Hampshire, is located partly within the Lawrence-Haverhill, Massachusetts, Urbanized Area and has a population of only 20,142; and, according to Spacetown, there has been no showing by either applicant that their proposed facilities would provide first primary service to at least 25% of the interference-free areas within their proposed 0.5 mv/m contours. Spacetown argues that the Commission requires "the use of the most recent and reasonable population figures available" (in this case the 1970 Census figures) to determine the Section 73.37 issue. In support, petitioner cites *Blue Ridge Broadcasting Co., Inc.*, 37 FR 3564, 23 RR 2d 887 (1972); and *Albert L. Crain*, 28 FCC 2d 381, 384, 21 RR 2d 607, 611 (1971).

3. In opposition, Salem and New Hampshire argue that the requirements of Section 73.37 are acceptability criteria only.[3] Therefore, at the time the applications were filed (November 11, 1968 for Salem, and February 27, 1969 for New Hampshire), they complied with one of the exceptions of Section 73.37(b), since the latest U.S. Census figures (those for 1960) showed Salem, New Hampshire, as being wholly outside any urbanized area and the Salem proposals would be the first standard broadcast facility for the community. Further, both Salem and New Hampshire maintain that *Blue Ridge Broadcasting*, *Supra*, does not apply here because the original application in that case was based on an erroneous determination that no prohibited overlap existed. Finally, both applicants request that if the Board fails to find that they fall within the exceptions of Section 73.37(b), a waiver should be granted since it is alleged that the town of Salem will attain a population of 25,000 in the near future if its present growth rate continues and would then fall within another exception of Section 73.37(b) since, according to New Hampshire, the proposal if granted will be the first standard broadcast facility for Salem. The Broadcast Bureau, in its comments, considers the Commission's action in the *Blue Ridge* case as controlling; therefore, the Bureau concludes that in light of the 1970 Census, neither of the two applicants falls within any of the exceptions to Section 73.37(b). In reply, Spacetown argues that both applicants admit that prohibited overlap exists and that they no longer fall within the Section 73.37(b) exceptions to the prohibited overlap rule.[4]

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[2] The pertinent part of Section 73.37(b) states:

> (b) An application for a new daytime station or a change in the daytime facilities of an existing station may be granted notwithstanding overlap of the proposed 0.5 mv/m contour and the 0.025 mv/m contour of another co-channel station, where the applicant station is or would be the first standard broadcast facility in a community of any size wholly outside of an urbanized area (as defined by the latest U.S. Census), or the first standard broadcast facility in a community of 25,000 or more population wholly or partly within an urbanized area, or when the facilities proposed would provide a first primary service to at least 25 percent of the interference-free area within the proposed 0.5 mv/m contour. . . .

[3] The reasoning behind this argument, according to the opposition, is that Section 73.37 refers to the factors that are necessary for the Commission to *accept* an application, and, once these requirements are met, subsequent changes are irrelevant.

[4] In view of this, Spacetown states that it filed a petition to dismiss both applications on May 1, 1972. Since the petition was erroneously filed with the Commission and later refiled with the Administrative Law Judge, the actual date of the petition is May 12, 1972. The Administrative Law Judge has not acted on the petition as of the date of adoption of this document.

4. The Review Board is of the view that the Commission's opinions in *Blue Ridge*, *supra*, and *Albert L. Crain*, *supra*, provide ample precedent for using the 1970 U.S. Census data to establish that the town of Salem is within the Lawrence-Haverhill Urbanized Area and that the Salem applicants are therefore not entitled to the exception claimed by them in their original applications. The Commission will not ignore the present realities of an existing situation in reaching a decision. *Albert L. Crain*, *supra*. In this regard, Section 73.37(b) itself refers to the "latest" U.S. Census figures. See note 2, *supra*. Furthermore, it is equally clear from the *Blue Ridge* proceeding that the Commission intended this reasoning to apply to Section 73.37 issues. In *Blue Ridge*, the Commission designated the application of Hymen Lake for hearing on a Section 73.37 prohibited overlap issue, after the application had been accepted for filing. In that case, it appeared that a 1970 preliminary U.S. Census report included the applicant's co-community of license as part of an urbanized area for the first time, thereby eliminating his eligibility for a 73.37(b) exception. Although the applicant argued that the Commission "should utilize the latest census data available at the time the application was filed, and not the preliminary 1970 map of the * * * urbanized area",[5] the Commission designated the issue. In so doing, the Commission stated:

> In light of the conflicting claims over the population, location and character of the communities * * *, and the Commission's recent ruling [citing *Albert L. Crain*] upholding the use of the most recent and reasonable population figures available, the matter will be decided in hearing. Accordingly a Section 73.37(b) issue will be specified, and if evidence received in hearing establishes that the proposal would violate Section 73.37(b) of the rules, the application will be dismissed.[6]

Therefore, in this case and for purposes of this issue, Salem is a part of the Lawrence-Haverhill Urbanized Area according to the 1970 U.S. Census figures. However, the language in *Blue Ridge* and *Albert L. Crain*, also supports consideration at the hearing of the "most recent" population figures in determining compliance with the other exceptions in Section 73.37(b). For example, reliable population figures more recent than the 1970 Census figures may exist which support the applicants' claims that Salem now has a population of 25,000. However, this is a question of fact to be determined by the Administrative Law Judge at the hearing. In light of the foregoing, the Board will add appropriate issues against both Salem and New Hampshire.[7] Con-

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[5] 23 RR 2d at 891.

[6] 23 RR 2d at 891. (Footnotes omitted.)

[7] It is noted that the three applicants have filed no less than six petitions and related pleadings too numerous to mention (see the Appendix for a list of all the pleadings), in a running debate over the population of Salem, New Hampshire. In our opinion, these pleadings add nothing to the original dispute among the parties as to whether Salem qualifies for an exception to the prohibited overlap rule under Section 73.37(b) because it has attained a population of 25,000; nor do they contain information which was unavailable at the time of the filing of the original petition and opposition. Therefore, the Board will deny those petitions listed as numbers 9, 12, 14, 16, 17 and 18 in the attached Appendix. In addition, New Hampshire filed on May 1, 1972, a pleading entitled "Supplement and Errata". No petition requesting the Board to accept the pleading was filed; the material contained in the pleading goes far beyond mere correction of applicant's April 24, 1972 opposition; and it is not alleged that such material was not available at the time the opposition was filed. For these reasons, the Board will dismiss this unauthorized pleading. See Public Notice on *Filing of Supplemental Pleadings Before the Review Board*, No. 90836, released October 11, 1972.

sistent with Commission policy, waiver of Rule 73.37(b) is not appropriate. *Blue Ridge*, *supra*, 23 RR 2d at 891, n.4.

307(B) SUBURBAN COMMUNITY ISSUES

5. Spacetown also requests 307(b) Suburban Community issues against Salem and New Hampshire. Spacetown alleges that, although the Commission's observations in the designation Order with regard to the applicants' 5 mv/m coverage of Lawrence, Massachusetts, are technically accurate,[8] the Commission failed to consider the applicants' 5 mv/m penetration of the "Lawrence-Haverhill urbanized area" which has a total population of 113,035. Spacetown's attached engineering statement indicates that Salem's 5 mv/m contour will cover an area encompassing 19,934 persons in the Lawrence-Haverhill area, while New Hampshire's 5 mv/m contour will cover an area with 27,480 persons in the same area. Considering the city of Haverhill separately, Spacetown alleges that since Haverhill is twice the size of Salem; since there is "substantial" penetration of the 5 mv/m contours of both Salem applicants into Haverhill;[9] and since the applicants could have obtained "substantial compliance" with the coverage requirements of Section 73.188 at less than the present 5 kw proposed power, a 307(b) Suburban Community issue should be added. Spacetown also places a great deal of emphasis on the fact that the proposals of both Salem applicants specify MEOV's (maximum expected operating values) on their respective antenna patterns. Petitioner argues that the MEOV's must be used to determine the realistic 5 mv/m contour penetration of Lawrence and Haverhill, which, alleges Spacetown, would result in a greater 5 mv/m penetration than the theoretical antenna patterns would indicate.

6. In opposition, Salem, New Hampshire and the Broadcast Bureau (all of whose arguments will be consolidated here for clarity) submit that the Commission, in the designation Order, thoroughly and accurately reviewed the applicability of the 307(b) Suburban Community presumption and considered it rebutted as to the city of Lawrence, Massachusetts. It is further argued that any attempt to claim the status of a community for an urbanized area is without precedent, and, more important, Spacetown has not attempted to show any common interests that would indicate that the cities of Lawrence and Haverhill and the town of Methuen are a single community for 307(b) purposes. Further, considering Haverhill alone, argue respondents, it does not have the 50,000 population which automatically raises the 307(b) Suburban Community presumption and Spacetown has not shown any factors (*e.g.*, excessive power, great size difference in communities, or programming) which would warrant giving rise to the presumption in spite of the population. In reply, Spacetown argues that it is request-

[8] In its designation Order, the Commission considered specification of a 307(b) Suburban Community issue against the two Salem applicants because of the penetration of their 5 mv/m contours into Lawrence, Massachusetts, but held that the data submitted by the applicants rebutted the presumption.

[9] This allegedly "substantial" penetration appears to be a maximum of 11% and 21% by Salem and New Hampshire, respectively. The figures are contained in pages 2-3 of Spacetown's Engineering Exhibit II. However, as to the alleged 21% penetration, it is not clear what the basis of the calculations are since Spacetown merely indicates that the figures were based on "our own population study".

ing the addition of a Suburban Community issue because of a combination of the following factors: (a) 5 mv/m penetration of Lawrence and Haverhill; (b) allegedly excessive power proposed by both applicants; (c) fifty-five percent of Salem's proposed interference-free population will be located in Massachusetts; and (d) the MEOV's proposed by both applicants indicate that major distortion (in the theoretical antenna pattern) can be expected toward Lawrence, Haverhill and Methuen.

7. The Review Board will not add the requested Suburban Community issues against either Salem or New Hampshire. In the designation Order, the Commission considered the 5 mv/m coverage of Lawrence, Massachusetts, and the shape and orientation of the radiation patterns proposed by the applicants in relation to the 307(b) Suburban Community issue. Spacetown's argument that the Salem applicants are proposing excessive power (*i.e.*, 5 kw) is unconvincing since the Commission, in its designation Order, also considered the possibility of a 1 kw operation for the Salem proposals and found that 1 kw "would not provide adequate service to Salem", the city of license. Since the Commission has, in a "reasoned analysis", considered and rejected these same arguments, it would not be appropriate for the Board to consider the merits of Spacetown's allegations. *Atlantic Broadcasting Co.*, 5 FCC 2d 717, 8 RR 2d 991 (1966); *Jefferson Standard Broadcasting Co.*, 25 FCC 2d 559, 20 RR 2d 62 (1970). As to Spacetown's suggested reliance on MEOV's for determining penetration for a 307(b) issue, the Board rejects this argument. Maximum expected operating values (MEOV's) of radiation are used in calculating the extent of interference contours; while the theoretical values of radiation are used in calculating coverage contours. The 5 mv/m contour, as used in determining whether a Surburban Community presumption is raised, is a coverage contour and therefore it is based on the theoretical values of radiation. As the Board stated in deleting a Suburban Community issue in *Lawrence County Broadcasting Corporation:* [10]

> . . . since it is a normal practice in determining the area coverage of a station to use computed values, the use of computed values, not MEOV's, is appropriate to determine whether or not the proposed station comes within the Commission's section 307(b) Suburban Community policy.

In addition, the applicants' proposed penetration of Haverhill does not, in the Board's opinion, give rise to a 307(b) Suburban Community presumption [11] because Haverhill does not have the required 50,000 population; [12] the directional patterns proposed by both applicants are designed so that the major radiation is not directed toward the Haverhill area, but the major lobes are directed over Salem; the difference in the populations of Salem and Haverhill is not that significant; the

[10] 7 FCC 2d 906, 907, 9 RR 2d 1070, 1072 (1967).

[11] The Board agrees with the Bureau and Spacetown that, if there is a 5 mv/m penetration of two cities and the applicant rebuts the presumption as to one, it does not mean that the applicant has rebutted the presumption as to the other. *Tidewater Broadcasting Company, Inc.*, 12 FCC 2d 471, 12 RR 2d 1133, rehearing denied 14 FCC 2d 646, 14 RR 2d 161 (1968), affirmed *sub nom. Edwin R. Fisher* v. *FCC*, 135 U.S. App. D.C. 134, 417 F.2d 551, 16 RR 2d 2145 (1969).

[12] Spacetown's Engineering Exhibit II, p. 2, indicates that Haverhill is actually decreasing in population.

maximum 5 mv/m penetration of Haverhill is only about 20%; and no exceptional factors have been introduced by Spacetown to show that a 307(b) Suburban Community issue is warranted. See *Click Broadcasting Co.*, 19 FCC 2d 497, 17 RR 2d 164 (1969); *Babcom, Inc.*, 12 FCC 2d 306, 12 RR 2d 998 (1968); *V.W.B. Incorporated*, 8 FCC 2d 744, 10 RR 2d 563, reconsideration denied 10 FCC 2d 534, 11 RR 2d 653 (1967).

SITE AVAILABILITY ISSUES AGAINST SALEM

8. Spacetown next requests issues of site availability, Section 1.65, misrepresentation and comparative character qualifications against Salem. All of the requested issues arise out of the same basic fact situation.[13] In addition, New Hampshire, in its petition to enlarge issues, filed May 10, 1972, also requests a site availability issue against Salem.[14] Subsequently, on July 11, 1972, Salem filed an amendment to its application specifying a new site.[15]

9. Based on the affidavit of a local real estate agent, which is attached to the petition, Spacetown alleges that Salem's originally proposed site is part of a larger plot of land which the present owner does not intend to subdivide or sell other than as a whole. Spacetown further alleges that Salem has no option on any part of the site. According to Spacetown, Salem represented in its application that it "currently holds an option to purchase the property". Spacetown contends that since Salem has not had such option for some time, Section 1.65 and misrepresentation issues are warranted.

10. In opposition, Salem and the Broadcast Bureau argue that Spacetown's allegations are not based on affidavits of individuals having personal knowledge as required by Section 1.229(c) of the Commission's Rules. The affidavit submitted is from a real estate agent and, according to respondents, constitutes hearsay. The Broadcast Bureau also alleges that no explanation is given for Spacetown's failure to obtain affidavits from the owners of the property in question, citing *Augusta Telecasters, Inc.*, 10 FCC 2d 594, 11 RR 2d 625 (1967). In this regard, Salem submits that at the time it filed its application, it did have a written option on the site;[16] however, on April 1, 1972, the owner of the land, without Salem's knowledge, entered into an agreement to sell the entire tract to a Boston-based "concern". According to Salem, it learned of the agreement only about two weeks before the date it filed its opposition pleading (*i.e.*, April 25, 1972);

[13] Spacetown had originally based both its requested site availability issues, in part, on zoning considerations; however, in its erratum to motion to enlarge issues, filed March 24, 1972, Spacetown states that it misunderstood the results of a recent rezoning vote upon which it based its argument and therefore wishes to eliminate references to zoning in its original petition.

[14] New Hampshire's request is based specifically on Salem's April 25, 1972 amendment which states that the owner of the land which was specified as Salem's proposed site, has agreed to sell the tract to a Boston, Massachusetts, "concern"; however, it is being treated here because it is based on the same basic fact situation as Spacetown's request.

[15] The Administrative Law Judge has not yet acted on the proposed amendment.

[16] Upon the expiration of this option, a second written option was obtained. Salem also filed a petition for leave to file supplement, and supplement to opposition to motion to enlarge issues on May 22, 1972, which contains an executed copy of an affidavit previously mentioned, but not included in its opposition concerning the option. Since there is no opposition to the petition and it involves a minor technical correction, the Board will grant the petition.

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it then entered into negotiations with the prospective purchaser for an option and also obtained an oral option on an alternate site 3,000 feet from the proposed site in the event the present site should become unavailable.[17] In reply, Spacetown stresses that Salem's account of the site availability question is not supported by an affidavit of any sort.[18]

11. The Review Board will add the requested issue because Salem's opposition, filed June 11, 1972, indicates that the applicant no longer has reasonable assurance of the availability of the site proposed in its application, and, in light of this, has filed an amendment with the Administrative Law Judge specifying an alternate site.[19] However, at least through April 1, 1972, and apparently for sometime beyond this date (when Salem alleges it actually became aware of the April 1st agreement), Salem had reasonable assurance of the availability of its site. According to Salem, it originally had a written option (which was subsequently renewed) on the proposed site and later received oral assurances from the owner and a prospective buyer (who did not purchase the land as expected) that the site would be available to Salem. Spacetown does not contradict this allegation. As of April 25, 1972, when Salem filed its Section 1.65 statement, Salem states that it was still attempting to cure the problems with its proposed site, but that it also had secured an oral option on an alternate site 3,000 feet away. It is well established that an applicant need not have absolute assurance of the availability of a proposed site; it is only necessary for the applicant "to have reasonable assurance of site availability and to make a good faith representation that the site selected will be available to him for his desired purposes." *William R. Gaston*, 35 FCC 2d 615, 620, 24 RR 2d 741, 748, review denied FCC 72–828, released September 22, 1972. See also *Edward G. Atsinger, III, supra; Marvin C. Hanz*, 21 FCC 2d 420, 18 RR 2d 310 (1970). In addition, it is well settled that an oral agreement is sufficient to satisfy the availability requirement. *William R. Gaston, supra.* See *Lawrence County Broadcasting Corp.*, 8 FCC 2d 597, 10 RR 2d 471 (1967). Under this test, it appears that Salem had "reasonable assurance" of the availability of its site until sometime after April 1, 1972. However, in light of Salem's pending amendment specifying a new site it now appears that Salem no longer has reasonable assurance of the availability of its site. Consequently, a site availability issue is warranted.

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[17] A description of Salem's efforts concerning both sites is contained in the Section 1.65 statement filed with Salem's amendment of April 25, 1972, and accepted by the Presiding Judge on October 10, 1972 (FCC 72M–1262).

[18] On June 13, 1972, Spacetown filed a petition to supplement its motion to enlarge issues, in which it submits an affidavit of the owner of the proposed site stating that Salem has no option on the land. As Salem and the Broadcast Bureau point out in their oppositions, Spacetown's supplement shows nothing more than, as of May 11, 1972, Salem had no option on its original site, a proposition which is not disputed by Salem. The Board also agrees with the Bureau that it is difficult to understand why Spacetown has not submitted a statement from the owner of the land in question disputing Salem's account of the situation. In light of Salem's original opposition pleading, however, the Bureau is of the opinion that a site availability issue is warranted unless Salem's June 28, 1972, response to New Hampshire's petition to enlarge issues is able to establish that the prospective purchaser of the site is willing to permit Salem to use the tract in question. The Review Board will deny Spacetown's petition to file the supplement since it adds nothing material to the issues under discussion. See note 7, *supra*.

[19] The Board is aware that Salem filed a petition for leave to amend on July 11, 1972, which attempts to eliminate the problems with its presently proposed site by specifying an alternate site; however, since this amendment has not been accepted as yet by the Presiding Judge, the originally proposed site constitutes the site of record. See *Edward G. Atsinger, III*, 30 FCC 2d 493, 499–500, 22 RR 2d 236, 244 (1971), and cases cited therein.

12. In our opinion, Section 1.65 and misrepresentation issues are not warranted against Salem. Since Salem alleges that it did not know of the April 1st agreement by the owner of the proposed site until two weeks thereafter (and Spacetown has not disputed this), Salem was well within the 30-day period afforded by Section 1.65 for notifying the Commission of changes in an application when it filed the April 25th statement. The requested misrepresentation issue will also be denied. The issue is based upon the statement in Salem's application that: "Applicant currently holds an option to purchase the property." Salem apparently did have an option when this statement was made; it had oral assurances of the availability of one or the other of the two sites until it filed an amendment specifying a new site. Spacetown offers no explanation for its failure to obtain an affidavit from the owner of the land in question if it wished to contradict Salem's statements; but, instead, chose to rely on statements of a real estate agent, which are clearly hearsay, as to the owner's intentions regarding his land. In view of these circumstances, a misrepresentation issue is inappropriate, *Cf. William R. Gaston, supra.*

SITE AVAILABILITY ISSUE AGAINST NEW HAMPSHIRE

13. Spacetown also requests site availability and Section 1.65 issues against New Hampshire, alleging: (a) that New Hampshire has no option or other assurance as to the availability of its proposed site; and (b) that New Hampshire's site is presently owned by five separate owners, a factor which will make the likelihood of acquiring the site extremely remote. In support of these allegations, Spacetown offers sworn statements of its consulting engineer and a local real estate agent purporting to relate what was told to them by various owners of the land in question. The affidavit of the engineer states that a Mr. McDonough, owner of the main piece of property involved, told Spacetown's president that New Hampshire spoke to him (McDonough) about his property several years ago; however, according to the engineer, he did not give New Hampshire an option. In opposition, New Hampshire and the Broadcast Bureau submit that Spacetown relies on hearsay (in some cases double hearsay) and that no affidavit of individuals with personal knowledge has been submitted. The opposition pleadings also cite cases which stand for the proposition that reasonable assurance of the availability of the site has been held sufficient to avoid an issue.[20] In addition, New Hampshire attaches a copy of a proposed amendment filed with the Administrative Law Judge which includes a copy of an option from Mr. McDonough.

14. The Board will not add the requested site availability or Section 1.65 issues against New Hampshire. The failure of Spacetown to submit affidavits from the landowners involved is unexplained and inexcusable in these circumstances. Second, and even third-hand, allegations will not support a petition to enlarge issues. *Cosmopolitan Enterprises, Inc.*, 4 FCC 2d 637, 8 RR 2d 202 (1966).

[20] *Lorenzo W. Milam and Jeremy D. Lansman*, 4 FCC 2d 610, 7 RR 2d 765 (1966); *El Camino Broadcasting Corp.*, 23 FCC 2d 173, 19 RR 2d 53 (1970).

SUBURBAN ISSUES

15. Spacetown next requests *Suburban* issues against Salem and New Hampshire, alleging that both applicants have failed to comply with Question 6 of the *Primer*.[21] In support, Spacetown alleges that substantial portions of the major communities of Lawrence, Haverhill and Methuen, Massachusetts, fall within the service contours of Salem's proposed station, but that no interviews have been conducted by Salem or New Hampshire with community leaders or members of the general public from these cities. Spacetown further alleges that: nowhere does Salem's application indicate that it will not serve Haverhill (with programming), nor does it explain why; the application is ambiguous as to Salem's intended service to the city of Lawrence; and the applicant affirmatively states that it intends to serve Methuen, but no residents of that city were included in the applicant's survey. With respect to New Hampshire, Spacetown alleges that although this applicant states that it does not intend to serve Haverhill or Methuen (Lawrence is not involved in the requested *Suburban* issue against New Hampshire), the reasons given by New Hampshire for not proposing to serve the two communities are not supported by the "usable" coverage which will be provided to Haverhill and Methuen or by the integrated nature of this allegedly unified urbanized area.[22]

16. In opposition, Salem argues that its application states that Lawrence is currently served by two standard broadcast stations of its own (and, the Board assumes, this implies that Salem does not intend to serve Lawrence). The same rationale, according to Salem, applies to the city of Haverhill. As to Methuen, Salem argues that the *Primer*, *supra*, does not necessarily require surveys of community leaders of Methuen; however, Salem has conducted six interviews of Methuen community leaders and is submitting the results in a proposed amendment.[23] The Bureau opposes the addition of an issue against New Hampshire because the reasons given by the applicant for not serving the communities of Methuen and Haverhill are in accordance with the *Primer*, *supra*, and New Hampshire's decision not to serve these communities is not inherently unreasonable. Further, argues the Bureau, the fact that an urbanized area is involved is of little significance because, in the *Primer*, *supra*, the Commission specifically stated that it was deleting any requirement that an applicant

[21] *Primer on Ascertainment of Community Problems by Broadcast Applicants*, 27 FCC 2d 650, 21 RR 2d 1507 (1971). Question 6 of the *Primer* reads as follows:

Q. Is an applicant expected to ascertain community problems outside the community of license?

A. Yes. Of course, an applicant's principal obligation is to ascertain the problems of his community of license. But he should also ascertain the problems of other communities that he undertakes to serve, as set forth in his response to Question 1(A)(2) of Section IV-A or IV-B. . . . If an applicant chooses not to serve a major community that falls within his service contours a showing must be submitted explaining why.

[22] New Hampshire's reasons are stated in its application and include: (a) both communities are in another state; (b) Haverhill has two broadcast stations licensed to it; and (c) residents of Haverhill and Methuen "turn to" Lawrence and Haverhill stations for their broadcast service.

[23] The amendment, filed April 25, 1972, and accepted by the Administrative Law Judge by Order, FCC 72M-1262, released October 10, 1972, includes interviews with community leaders from Methuen and is obviously aimed at curing this alleged defect in its application. Since Question 7 of the *Primer* indicates that interviews with community leaders are sufficient to ascertain community needs and problems in areas outside the city of license, the request for a *Suburban* issue as to Salem's survey of Methuen is now moot.

for a station licensed to a city within a Standard Metropolitan Statistical Area (SMSA) ascertain community problems in each of the cities within the area. As to Salem, the Bureau is of the opinion that, for the reasons discussed regarding New Hampshire's situation, the issue requested against Salem should also be denied. In its opposition, New Hampshire adopts the position of the Broadcast Bureau.

17. The Review Board, first, does not agree with Spacetown that Question 6 of the *Primer* is necessarily applicable to the instant fact situation. The *Primer* speaks in terms of "major" communities that "fall within" the applicant's service contours. According to Spacetown's own engineering exhibits, only portions of Lawrence and Haverhill fall within the 5 mv/m contour of the proposals of Salem and New Hampshire (approximately 5% of the Lawrence population and 10–20% of Haverhill). It is not clear from these exhibits how much of the cities' populations fall within the relevant 2 mv/m contours for establishing primary service to city residential areas. See Section 73.182(f) of the Rules. However, because of the directionalized coverage pattern of the stations, the coverage is directed away from these cities. In any event, nothing in the *Primer* requires a broadcast applicant to survey small *portions* [24] of large communities which fall within its service area, even though these communities as a whole would constitute "major" communities in relation to the community of license. In addition, the fact that Lawrence and Haverhill are in the same urbanized area as the applicants' specified station location is not a persuasive argument for addition of the requested issue since the Commission specifically disclaimed use of the SMSA in defining the area to be surveyed and the applicant has shown no other factors requiring a survey. Finally, the reasons given by New Hampshire for not serving Haverhill and Methuen (see note 22, *supra*) are not unreasonable and are in accord with the *Primer*.[25] Therefore, the Board will deny the requested *Suburban* issues.

FINANCIAL AND REAL PARTY-IN-INTEREST ISSUES AGAINST NEW HAMPSHIRE

18. Spacetown's requests for financial and real party-in-interest issues against New Hampshire are based on the applicant's financial arrangement with the Merrimack Valley National Bank of Lawrence, Massachusetts. Spacetown alleges that the bank's letter of August 31, 1971, is unacceptable for the purposes of establishing New Hampshire's ability to construct and operate its proposed station for numerous reasons. In addition, Spacetown argues that New Hampshire has underestimated the cost of acquiring its proposed transmitter site by at least $6,000.[26] Spacetown further alleges that the $18,000 parcel is only half of New Hampshire's proposed site; therefore, total land costs will amount to $36,000, or $19,500 less than funds available. The Broadcast Bureau supports the addition of a financial issue against New Hamp-

[24] See the Board's comments on the petitioner's use of MEOV's to allege greater penetration of these cities at paragraph 7, *supra*.

[25] 27 FCC 2d at 659, 21 RR 2d at 1516–17.

[26] New Hampshire's supplemental amendment of April 24, 1972 (accepted by Order of the Administrative Law Judge, FCC 72M–622, released May 11, 1972) increased its estimated cost of land acquisition from $12,000 to $18,000 (thereby eliminating this objection) and decreased its estimated building costs by $20,000.

shire because of the expiration of the bank's commitment letter and a missing signature on the loan commitment. The Bureau, however, opposes Spacetown's contention that New Hampshire has underestimated the cost of its proposed site because the contention is based on double hearsay (Peter V. Gureckis, Spacetown's engineer, states in an affidavit that Albert P. Gureckis, Spacetown's president, spoke to the owner of the land who stated the price) and the contention that the proposed site appears to encompass more than just one parcel of land with total costs approaching $36,000 is mere speculation. In opposition, New Hampshire states that it has submitted an updated letter of credit eliminating all possible bases for the financial and real party-in-interest issues, including a new loan commitment which eliminates the objections of the Broadcast Bureau.[27]

19. In light of the Presiding Judge's acceptance of this amendment which appears to eliminate the provisions in New Hampshire's financial showing which were objected to by Spacetown and the Bureau, the Review Board will not add the requested financial and real party-in-interest issues. In addition, to the extent that Spacetown's allegations are not answered by New Hampshire's April 20, 1972 amendment, the Board rejects them as being unsupported by affidavits of persons having personal knowledge of the facts alleged. See Section 1.229(c) of the Commission's Rules. See also *RKO General, Inc.*, 34 FCC 2d 263, 24 RR 2d 22 (1972); *Roberts Flying Service, Inc.*, 31 FCC 2d 777, 22 RR 2d 985 (1971). However, since it appears that New Hampshire's most recent loan commitment expired as of September 1, 1972, the Board will add a limited financial issue against New Hampshire for the sole purpose of determining the continuing availability of its loan from the Merrimack Valley National Bank.

FINANCIAL QUALIFICATIONS ISSUES AGAINST SALEM

20. *Spacetown petition.* Finally, Spacetown requests that the limited financial issue specified against Salem in the designation Order be expanded to include an inquiry into the cost of acquiring the site since, petitioner alleges, the proposed site has a value substantially in excess of the $18,000 estimated by Salem. The Broadcast Bureau opposes expansion of the financial issue against Salem based on its underestimated cost of acquiring the land for its proposed site because Spacetown relies on a letter from a real estate agent, rather than the owner of the property to establish the sale price of the site. The Board agrees with the Bureau and will not add the requested issue since Spacetown has not supported its request by affidavits of persons having personal knowledge as required by Section 1.229(c) of the Commission's Rules. *RKO General, Inc., supra;* and *Roberts Flying Service, Inc., supra.*

21. *New Hampshire petition.* New Hampshire requests expansion of the limited financial issue specified against Salem on numerous grounds, most of which have been mooted by several amendments filed by Salem earlier this year [28] and accepted by the Administrative Law

[27] The amendment containing these changes was accepted by the Presiding Judge, by Order, FCC 72M-622, released May 11, 1972.

[28] (a) Amendment of April 25, 1972; (b) supplement thereto of May 19, 1972; and (c) amendment of August 11, 1972.

Judge on October 10, 1972 (FCC 72M–1262). Therefore, the parties' arguments on these matters are moot and need not be considered. However, one argument raised by New Hampshire in its reply remains unanswered. According to New Hampshire, Salem's application authorizes the issuance of 200 shares of stock; nevertheless, New Hampshire states, Salem's recent amendment shows over 1900 shares already subscribed. In addition, New Hampshire argues, two of the three balance sheets submitted do not indicate the financial ability of the subscribers to comply with the terms of the agreement.[29] New Hampshire also states that its requested issue inquiring into Salem's first-year cost of operation was premised on Salem's failure to provide the itemization required in response to item (1)(b), Section III of FCC Form 301, which are the bases of the estimates submitted by the applicant in item (a), Section III. For the above reasons, New Hampshire requests that several financial issues be added against Salem to inquire into the above matters.

22. The Board agrees with New Hampshire that regardless of the amendments, several problems with Salem's financial qualifications remain. Two of the subscribers' balance sheets (Perry's and Ebert's) raise questions as to their ability to meet their subscription agreements. First, Carol Ebert has subscribed to $10,000 worth of stock despite the fact that she has an annual salary of $10,000 per year.[30] Her balance sheet lists $3,500 in cash and $3,450 in unexplained "notes receivable". Without further explanation of this latter item, a substantial question is raised as to whether Ebert has sufficient resources to meet her substantial stock subscription, which amounts to a year's gross salary. Second, Edward Perry, who is subscribing to $1,750 in stock, lists his net worth as over $30,000 but has only $200 in cash on hand. The bulk of Perry's assets are stock in, and salaries and commissions due from, C & I Broadcasting; however, without a balance sheet for this company and in light of Perry's very low cash balance in relation to net worth, it is impossible to determine the liquidity of these assets. Further, the $1,700 unexplained "accounts receivable" is equally unclear. The Board cannot accept such vague assurances of the availability of such large amounts of money. As the Board stated in *Vista Broadcasting Co., Inc.*, 18 FCC 2d 636, 637, 16 RR 2d 838, 840 (1969): "It is well established that receivables, stocks and bonds, and fixed assets, in the absence of proof of marketability or liquidity, afford no reasonable assurance that funds will, in fact, be available to meet commitments to an applicant for a radio station." See also *Miami Broadcasting Corportion*, 9 FCC 2d 694, 10 RR 2d 1037 (1967). The financial position of these stockholders is even more important in light of Salem's amendment of August 11, 1972 (accepted by the Administrative Law Judge on October 11, 1972), which indicates that Perry and Ebert are two of only four remaining stockholders personally guaranteeing the indebt-

[29] New Hampshire also states that both Salem and the Bureau misunderstood its requested issue regarding Salem's projected professional fees. New Hampshire states that it was not questioning the reasonableness of the fees, but the availability of funds to meet these fees. The Board considers this simply another way of stating that New Hampshire questions Salem's overall financial qualifications.

[30] The Board is aware that Salem's amendment, filed July 11, 1972, indicates an increased annual salary of $11,000, but this does not change the Board's analysis.

edness of the corporation. Further, Salem's pending amendment, filed July 11, 1972, indicates that Perry's subscription may increase substantially to $8,500. In addition, the discrepancy in the number of shares of stock issued and the number authorized and Salem's failure to furnish the financial information required in item (1) (b), Section III of the April 25th amendment to its application, raise further questions as to Salem's financial qualifications. Therefore, the financial issue against Salem will be expanded in accordance with the above discussion.

23. Accordingly, IT IS ORDERED, That the petition to supplement reply, filed August 4, 1972, by Spacetown Broadcasting Corporation; that the petition for leave to file further supplement, filed August 2, 1972, by Salem Broadcasting Co., Inc.; that the petition to supplement opposition, filed July 25, 1972, by Salem Broadcasting Co., Inc.; that the petition to file further supplement to reply, filed June 27, 1972, by Spacetown Broadcasting Corporation; that the petition to file supplement to motion to enlarge issues and supplement to motion to enlarge issues, filed June 13, 1972, by Spacetown Broadcasting Corporation; that the petition to file supplement to reply, filed June 13, 1972, by Spacetown Broadcasting Corporation; and that the petition to file supplement to opposition to motion to enlarge issues, filed May 23, 1972, by Salem Broadcasting Co., Inc., ARE DENIED; and

24. IT IS FURTHER ORDERED, That the petition for leave to file supplement to opposition, filed May 22, 1972, by Salem Broadcasting Co., Inc., IS GRANTED; and

25. IT IS FURTHER ORDERED, That the motion to enlarge issues, filed March 13, 1972, by Spacetown Broadcasting Corporation IS GRANTED to the extent indicated below and IS DENIED in all other respects; and

26. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed March 13, 1972, by New Hampshire Broadcasting Corporation, IS GRANTED to the extent indicated below and IS DENIED in all other respects; and

27. IT IS FURTHER ORDERED, That the petition to enlarge issues, filed May 10, 1972, by New Hampshire Broadcasting Corporation, IS GRANTED;

28. IT IS FURTHER ORDERED, That the issues in this proceeding ARE ENLARGED to including the following issues:

(a) To determine whether overlap would occur between the proposed 0.5 mv/m contour of Salem Broadcasting Co., Inc., and the 0.025 mv/m contour of Radio Station WHIM, Providence, Rhode Island, in contravention of Section 73.37 of the Commission's Rules and Regulations;

(b) To determine, if it is found that the overlap described above would occur, whether the application of Salem Broadcasting Co., Inc., falls within the exceptions to the Rule contained in Section 73.37(b), or whether the application should be dismissed;

(c) To determine, with respect to the application of Salem Broadcasting Co., Inc., whether the applicant is reasonably assured of its proposed transmitter site;

(d) To determine whether overlap would occur between the proposed 0.5 mv/m contour of New Hampshire Broadcasting Corporation and the 0.025 mv/m contour of Radio Station WHIM, Providence, Rhode Island, in contravention of Section 73.37 of the Commission's Rules and Regulations;

(e) To determine, if it is found that the overlap described above would occur, whether the application of New Hampshire Broadcasting Corporation falls within the exceptions to the Rule contained in Section 73.37(b), or whether the application should be dismissed;

(f) To determine, with respect to the application of New Hampshire Broadcasting Corporation, whether the Merrimack Valley National Bank, or any other banking institution, is willing to loan the applicant the amount it proposes to use for the first-year construction and operation expenses.

29. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to issues (a), (b) and (c), added above, SHALL BE on Salem Broadcasting Co., Inc., and the burden of proceeding with the introduction of evidence and the burden of proof with respect to issues (d), (e) and (f), added above, SHALL BE on New Hampshire Broadcasting Corporation; and

30. IT IS FURTHER ORDERED, That the financial issue (No. 3 in the designation Order, *supra*) specified against Salem Broadcasting Co., Inc., IS MODIFIED to read as follows:

3. To determine, with respect to the application of Salem Broadcasting Co., Inc.:

(a) Whether the Arlington Trust Company, or any other banking institution, is willing to loan the applicant the amount it proposes to use for first-year construction and operation expenses;

(b) The number of shares of stock issued and/or authorized by the corporation;

(c) The facts concerning the failure of the applicant to provide the information requested by Section III, 1(b) of Commission Form 301;

(d) Whether Edward Perry and Carol Ebert, stockholders of Salem Broadcasting Co., Inc., have sufficient net liquid assets to meet their stock subscription commitments; and

(e) Whether, in light of the evidence adduced pursuant to a, b, c and d above, the applicant is financially qualified.

31. IT IS FURTHER ORDERED, That the burden of proceeding with the introduction of evidence and the burden of proof with respect to the financial qualifications issue, as modified, SHALL BE on Salem Broadcasting Co., Inc.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

Docket No. 19434, *et al.*
Salem, N.H.

APPENDIX

A. (1) Motion to enlarge issues, filed March 13, 1972, by Spacetown Broadcasting Corporation.
(2) Erratum, filed March 24, 1972, by Spacetown.
(3) Broadcast Bureau's comments, filed April 20, 1972.
(4) Opposition, filed April 24, 1972, by Salem Broadcasting Co., Inc.
(5) Opposition, filed April 24, 1972, by New Hampshire Broadcasting Corporation.
(6) Supplement and errata, filed May 1, 1972, by New Hampshire.
(7) Reply to oppositions, filed May 15, 1972, by Spacetown.
(8) Petition for leave to file supplement, and supplement to opposition, filed May 22, 1972, by Salem.
(9) Petition to file supplement to opposition, filed May 23, 1972 filed by Salem.

(10) Supplement to opposition, filed May 23, 1972, by Salem.
(11) Petition to file supplement to motion to enlarge issues and supplement to motion to enlarge issues, filed June 13, 1972, by Spacetown.
(12) Petition to file supplement to reply and supplement to reply, filed June 13, 1972, by Spacetown.
(13) Broadcast Bureau's comments on "Petition to file supplement to motion to enlarge issues and supplement to motion to enlarge issues," filed June 21, 1972.
(14) Petition to file further supplement to reply and further supplement to reply, filed June 27, 1972, by Spacetown.
(15) Opposition to petitions to supplement motion to enlarge issues, and reply to oppositions thereto, filed July 11, 1972, by Salem.
(16) Petition to supplement opposition and supplement, filed July 25, 1972, by Salem.
(17) Petition for leave to file further supplement and supplement, filed August 2, 1972, by Salem.
(18) Petition to supplement reply and supplement, filed August 4, 1972, by Spacetown.
(19) Opposition to supplement, filed August 17, 1972, by Salem.
(20) Opposition to supplement to reply, filed August 17, 1972, by New Hampshire.

B. (1) Petition to enlarge issues, filed March 13. 1972, by New Hampshire.
(2) Broadcast Bureau's comments, filed April 13, 1972.
(3) Opposition, filed April 24, 1972, by Salem.
(4) Reply to opposition, filed May 5, 1972, by New Hampshire.

C. (1) Petition to enlarge issues, filed May 10, 1972, by New Hampshire.
(2) Opposition, filed July 11, 1972, by Salem.

F.C.C. 72-1037

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of AMENDMENT OF PART 1 OF THE COMMISSION'S RULES TO REQUIRE SIMULTANEOUS PAYMENT OF THE FILING AND GRANT FEE WITH AN APPLICATION FOR CERTIFICATION OR TYPE ACCEPTANCE	Docket No. 19642

NOTICE OF PROPOSED RULE MAKING

(Adopted November 22, 1972; Released November 29, 1972)

BY THE COMMISSION:

1. Notice is hereby given of proposed rule making in the above entitled matter.

2. A schedule of application fees for a variety of authorizations became effective on March 17, 1964.[1] On July 1, 1970,[2] this schedule was revised and extended to include applications for equipment authorization. On March 24, 1971,[3] in response to a petition for reconsideration, the fee schedule with some minor changes was reaffirmed. The schedule of fees has subsequently been expanded as provisions for new Part 15 devices which require certification are incorporated in our Rules. The fee required under this schedule is divided into two parts—a filing fee that must accompany the application, and a grant fee that must be paid within 45 days of the date of the grant.

3. Certification and type acceptance are equipment authorizations which we grant after review of test data submitted to the Commission. A grant of the latter kind of authorization is based upon appropriate testing by the manufacturer in terms of the current technical standards of the service in which the equipment will be operated under license and attaches to all units subsequently manufactured by the same person which are substantially identical to the ones tested and approved. Certification is used for other types of radiation devices such as TV receivers, operated under Parts 15 and 18 of our rules. A grant of this kind is based upon appropriate testing by the manufacturer in terms of the applicable technical standards and he is permitted to certificate the devices tested, and all others subsequently manufactured which are substantially identical, after notification to and acceptance by the Commission of the proposed certificate.

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[1] Docket No. 14507, Report and Order adopted May 6, 1963, FCC 63-414, 28 F.R. 4658; Docket No. 14507, Memorandum Opinion & Order adopted September 25, 1963, FCC 63-856, 28 F.R. 10911.

[2] Docket No. 18802, Report and Order adopted July 1, 1970 (35 F.R. 10988, 23 FCC 2d 880).

[3] Docket No. 18802, Memorandum Opinion & Order adopted March 24, 1971 (35 F.R. 6056, 28 FCC 2d 139).

4. We have found that as the applicants for equipment authorizations gain familiarity with our rules and the presentation of information required by the Commission little difficulty is experienced in preparing an acceptable application. In cases where sufficient information and measurements data is not included with the application, grant of equipment authorization is deferred pending the receipt of the additional information required to complete the application; the Commission denies few of these applications. We estimate that greater than 95% of the applications received for equipment authorizations are granted by the Commission. The high percentage of authorizations which are granted is a result of the applicants desire to persue his application for certification or type acceptance until a grant is issued. This grant permits him to legally market (ship, sell, lease, import, etc.) the device he has developed or purchased. Some applicants for certification, recognizing the high probability that a grant will be made, have found it advantageous to submit the required filing and grant fee simultaneously. Such simultaneous filing is advantageous to the Commission since at decreases by one-half the number of transactions to be handled by the fee section. It also reduces application handling for processing groups, since it is not necessary to determine that fees are paid within the prescribed time. Thus simultaneous filing reduces substantially the administrative burden on the Commission. This is true, of course, provided the number of grants which are denied is small—a situation that exists in the case of applications for type acceptance and certification.

5. We are therefore proposing to make mandatory the simultaneous payment of filing and grant fees prescribed in Part 1 of the rules for equipment which is required by the Commission to be certified or type accepted. While we believe most of the procedures herein proposed to be self-explanatory, it may be helpful to discuss certain portions of the proposed rules.

COMBINED FEES FOR CERTIFICATION AND TYPE ACCEPTANCE

6. The present rules provide for the separate payment of filing and grant fees for certain equipment authorizations. The proposed rules require the combined payment of the filing and grant fees as set out in Appendix A attached. This will permit the Commission and applicants for these equipment authorizations to take full advantage of the economies possible through payment of a single combined fee. To provide an orderly transition period for the industry to adjust to this new procedure, simultaneous payment of fees will become mandatory on July 1, 1973.[4] Applications filed on or after that date will not be processed prior to the receipt of both the filing and grant fees. Should the Commission deem it necessary to deny a grant for certification or type acceptance, the grant fee will be refunded in full. The rules proposed herein will permit the withdrawal of a request for equipment authorization and remittance of the grant fee in full prior to the date such grant is made.

[4] Or such earlier date as the Commission may determine to be practicable.

7. Authority for the adoption of the amendments herein proposed is contained in Section 4(i) (47 U.S.C. sec. 154(i) of the Communications Act, Title V of the Independent Offices Appropriation Act of 1952 (31 U.S.C. sec. 483(a), and Budget Bureau Circular A–25 and supplements thereto.

8. Pursuant to applicable procedures set forth in § 1.415 of the Commission's rules, interested persons may file comments on or before January 8, 1973, and reply comments on or before January 18, 1973. All relevant and timely comments and reply comments will be considered by the Commission before final action is taken in this proceeding. In reaching its decision on the rules of general applicability which are proposed herein, the Commission may also take into account other relevant information before it, in addition to the specific comments invited by this notice. No extensions of time will be granted for filing either comments or reply comments.

9. In accordance with the provisions of § 1.419 of the Commission's rules and regulations, an original and 14 copies of all comments or other documents filed in this proceeding shall be furnished the Commission. Responses will be available for public inspection during the regular business hours in the Commission's Public Reference Room at its Headquarters in Washington, D.C.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

APPENDIX A

Part 1 of Chapter I, Title 47, of the Code of Federal Regulations is amended as follows:

1. Section 1.1102 is amended by adding a note immediately after paragraph (b), revising paragraphs (d) and (g) and adding a new (j) to read as follows:

§ 1.1102 *Payment of fees*

* * * * * * *

(b) * * *

NOTE: Combined fees. See paragraph (j) of this section concerning simultaneous payment of filing and grant fees with applications for type acceptance or certification of equipment.

* * * * * * *

(d) Where a separate grant fee payment is prescribed in the various services, the fee will be payable within 45 days after grant by the Commission. In the broadcast services, the grant fee, based on a percentage of the consideration, in assignment and transfer cases must be transmitted by the new licensee immediately following consummation of the transfer or assignment. All grants, approvals and authorizations issued by the Commission are made subject to payment and receipt of the applicable fee within the required period. Failure to make payment of the applicable fee to the Commission by the required date shall result in the grant, authorization or approval becoming null and void and ineffective after that date.

* * * * * * *

(g) Applications and attached fees should be addressed to: Federal Communications Commission, Washington, D.C. 20554, or to the appropriate FCC Field Office and should not be marked for the attention of any individual bureau or office. Fee payments should be in the form of a check or money order payable to the Federal Communications Commission. The Commission will not be responsible for cash sent through the mails. All fees

collected will be paid into the U.S. Treasury as miscellaneous receipts in accordance with the provisions of Title V of the Independent Offices Appropriations Act of 1952 (31 U.S.C. 483A).

* * * * * * *

(j) Combined filing and grant fees with applications for certification and type acceptance of equipment: Each application for certification or type acceptance of equipment shall be accompanied by a combined payment covering the filing and grant fees for such application. Payment of filing and grant fees separately is permissible until July 1, 1973;[1] however, applicants are encouraged to submit fees simultaneously prior to this date. On or after July 1, 1973 applications will not be processed prior to payment of the combined filing and grant fee.

2. Section 1.1103 is amended by adding a new paragraph (c) to read as follows:

§ 1.1103 *Return or refund of fees.*

* * * * * * *

(c) Grant fees received as part of a combined fee payment pursuant to § 1.1102(j) will be refunded in the following instances:

(1) When an application for certification or type acceptance is dismissed or denied by the Commission.

(2) When a request for withdrawal of the application is received prior to the date of grant of certification or type acceptance.

(3) When the failure of an applicant for certification or type acceptance to reply to a request for additional information results in a dismissal of the application.

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[1] Or such earlier date as the Commission may determine to be practicable.

F.C.C. 72-1047

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of TAFT BROADCASTING CO. For Renewal of Licenses of Stations WGR–AM–TV, Buffalo, N.Y.	File Nos. BR–223, BRCT–198

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 29, 1972)

BY THE COMMISSION: COMMISSIONER JOHNSON DISSENTING.

1. The Commission has before it for consideration (i) the above-captioned applications for renewal of license; (ii) a petition to deny the applications filed May 1, 1972, by the National Association of Broadcast Employees and Technicians, AFL–CIO, hereinafter "NABET"; and (iii) an opposition to the petition filed by Taft Broadcasting Company.

2. Section 309(d) of the Communications Act of 1934, as amended, 47 U.S.C. 309(d), provides that any party in interest may file a petition to deny any application, including a license renewal application. Where a petition to deny is filed, it must contain specific allegations of fact sufficient to show that a grant of the application would be *prima facie* inconsistent with the public interest. We are of the opinion that NABET's petition to deny the license renewal applications for Stations WGR and WGR–TV fails to raise a substantial or material question of fact warranting designation of those applications for hearing.

3. Initially, we note that while NABET's petition is directed against both WGR and WGR–TV, no allegations with respect to the AM station are contained in the petition. The petition as it relates to WGR–AM will therefore be denied summarily because of its pervasive lack of specificity as required by Section 309(d).

4. Further, NABET's pleading, insofar as it relates to WGR–TV, is also characterized by general allegations and is devoid of any specific facts which would indicate that a grant of the station's license renewal application would be *prima facie* inconsistent with the public interest. In its petition, NABET merely takes exception to several programming decisions made by the licensee. Thus, according to the petitioner, WGR–TV has wasted the "golden opportunity" afforded by the prime time access rule [1] by broadcasting reruns of the network produced "Petticoat Junction." Secondly, NABET charges Taft with poor judgment in broadcasting a program entitled "Human Sexuality," at 1 a.m. following Johnny Carson's "Tonight" show. NABET

[1] Section 73.658(k).

claims that "[t]he sparcity of the available audience that would respond to such a program during this airtime hardly requires additional comment." NABET further asserts that during its three week monitoring study (March 11 to April 1, 1972), WGR–TV broadcast no local live programming other than weather, news, and sports during prime time. Finally, petitioner charges that in June of 1970, Taft withdrew its two local live newscasts only to reschedule them early in 1972, with the advent of license renewal time. NABET also submits that Taft on June 1, 1970, "eliminated the highly regarded 'Romper Room' " program.

5. In its opposition pleading, Taft rebuts the allegations raised by NABET. First, with respect to the broadcast of "Petticoat Junction," Taft points out that Section 73.658(k)(3) of the rules expressly permits the presentation of off network programs during prime time access time until October 1, 1972. Secondly, regarding the broadcast of "Human Sexuality," the licensee states that the program was locally produced as a five-part series in cooperation with the Buffalo Council of Churches; that it dealt with such topics as promiscuity, venereal disease, abortion, and homosexuality, etc.; that the program was frank, controversial, and intended for adult viewing; and that, therefore, it was scheduled for viewing when the number of children in the audience would be at a minimum, citing *Pacifica Foundation*, 1 RR 2d 747, 751 (1964). With respect to the allegation that no local live programming other than weather, news, and sports was carried during NABET's three week monitoring period, Taft submits that on March 24, 1972, the public affairs program "Take a Look" was telecast from 10:30 to 11:00 p.m. That particular segment was entitled "Promise of the Future" and featured discussions by parents, teachers and police with students from a predominantly black high school. With reference to NABET's allegation that Taft withdrew two local live newscasts in June of 1970, only to reschedule them early in 1972, toward the end of the license period, Taft states that two five-minute newscasts were, in fact, replaced in June of 1970, by a Taft-produced series "Black History," and a local news and public interest program entitled "Around the Black World." In March of 1972, the "Black History" series was completed and was replaced with local live news. "Around the Black World" was moved to late evening hours and a five minute local live newscast was substituted in its original time slot. Taft concludes that WGR–TV cannot be faulted for providing programming of special interest to its black audience. Concerning "Romper Room," Taft states that this program was broadcast by WGR–TV for a full season, from September 8, 1969 through June 5, 1970, as well as from September 24, 1956 through March 21, 1958.

6. Licensees are, of course, afforded broad discretion in making programming decisions. The Commission will not question such decisions absent specific factual allegations sufficient to show that the licensee's overall programming performance has failed to serve the public within his service area. While NABET may disagree with Taft's decisions concerning the foregoing matters, it is obvious that petitioner has failed to make any showing which would indicate that the licensee has

either abused its discretion or otherwise failed to program to serve the public within the station's service area.

7. In view of the foregoing, we find that the programming judgments made by Taft were well within the limits of the broad discretion traditionally afforded broadcast licensees. Moreover, we find that the petitioner has failed to raise substantial or material questions of fact to establish that a grant of the above-captioned renewal applications would be *prima facie* inconsistent with the public interest. Having examined the applications, we find that a grant would serve the public interest, convenience, and necessity.

8. Accordingly, IT IS ORDERED, That the aforementioned petition to deny IS DENIED, and the above applications for renewal of licenses ARE HEREBY GRANTED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

38 F.C.C. 2d

109-018—72——7

F.C.C. 72R-346

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMPLAINT OF MRS. MARTHA TRANQUILLI, MOUND BAYOU, MISS., AGAINST MISSISSIPPI TELEPHONE & COMMUNICATIONS, INC.; MOUND BAYOU TELEPHONE CO., MARION, LA.; CENTRAL TELEPHONE & ELECTRONICS CORP., MONROE, LA.	Docket No. 19271

APPEARANCES

Charles H. Ryan, on behalf of Mississippi Telephone and Communications, Inc., and *James O. Juntilla* and *David Cosson*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission.

DECISION

(Adopted November 22, 1972; Released November 29, 1972)

BY THE REVIEW BOARD: NELSON, PINCOCK AND KESSLER.

1. This proceeding, designated as a "formal investigation" to be conducted under adjudicatory procedures, was initiated by the Commission on its own motion by Order, FCC 71-668, (36 FR 12640 published July 2, 1971), pursuant to Sections 201, 202, 203, 208 [1] and 403 [2] of the Communications Act of 1934, as amended. The Order provided that "without in any way limiting the scope of the proceeding, it shall include inquiry into the following:

1. Whether the use of the application form given to Mrs. Tranquilli was part of an injust or unreasonable practice in violation of Section 201 (a) or (b) of the Act or demonstrates that Mississippi Telephone and Communications, Inc., and its affiliates are or have been engaged in unjust and unreasonable discrimination in violation of Section 202(a) of the Act;

2. Whether Mrs. Tranquilli has been incorrectly billed for interstate telephone service and whether the telephone company has failed to make reasonable investigation into her complaints relating thereto, in violation of Sections 201(b), 202(a) and 203(c) of the Act;

3. Whether the sending of the disconnection notice to Mrs. Tranquilli was unreasonable under the circumstances so as to constitute a violation of Section 201(b) of the Act or was unjustly discriminatory contrary to Section 202(a) of the Act;

[1] These four sections are contained in Title II of the Act under the heading "Common Carriers." Section 201 deals with "service and charges"; Section 202 deals with "discrimination and preferences" and provides for penalties for violations in the sum of $500 for each offense and $25 for each day of continuance; Section 203 deals with "schedules and charges" and provides for the same penalties as Section 202; and Section 208 deals with "complaints to the Commission."

[2] This section provides the Commission with broad investigatory powers and with authority to initiate an inquiry on its own motion.

4. Whether the telephone company or any of its affiliates has, by imposing a late payment penalty charge, imposed a charge on interstate communications other than that set forth in the appropriate filed tariff in violation of Section 203(c) of the Act;

5. Whether the disconnection of service to Mrs. Tranquilli in 1966 because of her refusal to pay the federal telephone excise tax was a violation of Section 203(c) of the Act."

2. In its Order, the Commission set forth the basis for its inquiry, in substance, as follows: On January 12, 1971, the Commission forwarded to the Mississippi Telephone and Communications, Inc. (Telephone)[3] a copy of a letter received from Mrs. Martha Tranquilli in which she complained, among other things, that the company's service application form provided for the identification of an applicant's race; that the company sent her a disconnection notice for a bill which she had paid; that she had been charged for interstate calls which she had not made; and that she had experienced very noisy circuits when making toll calls. Upon receipt of a reply, the Commission, on February 22, 1971, requested clarification and further information. No response was received to said inquiry, nor to the Commission's follow-up letters of April 22, 1971 and May 17, 1971. Because of the importance of the questions raised by the complaint and because of the carrier's unwillingness to cooperate in resolving said questions through informal procedures, the Commission deemed it necessary to institute a formal investigation. In paragraphs 4 and 5 of the Order, the Commission set forth with considerable specificity the factual basis and rationale for each of the listed items of inquiry.

3. On February 25, 1972, subsequent to the prehearing conference, the Presiding Judge received a Stipulation of Facts entered into by the Chief, Common Carrier Bureau and Telephone, which Stipulation, by Order, was received in evidence as Joint Exhibit 1 (FCC 72M–330, released March 14, 1972). At the same time, the record was closed and provision was made for the filing of proposed conclusions. The Initial Decision, FCC 72D–29, of Administrative Law Judge Ernest Nash was released on May 10, 1972. Exceptions and briefs have been filed by Telephone and the Bureau.

4. In his Initial Decision, the Presiding Judge adopted the proposed conclusions of the Bureau that with respect to items 1, 2 and 3 of the designation Order, the record did not reflect any violations of the Communications Act. With respect to item 4—whether Telephone's imposition of a late payment penalty violated Section 203(c) of the Act—the Presiding Judge concluded that while the company did for a period send out customer bills which contained a 10 percent penalty charge and which may have been applied to charges for interstate or foreign communications services, such a charge was not collected from Mrs. Tranquilli; that this practice had been discontinued; and that a notice of liability for forfeiture would not be appropriate since the Commission did not give Telephone specific notice that such liability might arise out of this proceeding. With respect to item 5—whether the disconnection of service to Mrs. Tranquilli because of her refusal

[3] This company provides local telephone service to Mound Bayou where the complainant resides. All of its stock is owned by Century Telephone Enterprises, Inc. The other company listed in the caption is not here involved.

to pay the federal telephone excise tax violated Section 203(c) of the Act—the Presiding Judge concluded that such violation had occurred; that the violation had resulted from Telephone's misconception of its obligation to the federal government; that when the matter was called to its attention by the Commission's staff, Telephone changed its practice; that its operations are now consistent with the requirements of Section 203(c) and its obligations as a connecting carrier under applicable interstate tariffs; and that a forfeiture would not be appropriate. Finally, the Presiding Judge concluded the question of the Commission's jurisdiction over Telephone as an intrastate and connecting carrier had been rendered moot by reason of its participation in this proceeding and its actions to affect compliance with the requirements of the Act.

5. We have reviewed the Initial Decision in light of the exceptions, briefs and our examination of the record. Briefly stated, we are in accord with the Presiding Judge's findings of fact and his resolution of items 1, 2 and 3 of the designation Order. We are not in accord with his resolution of items 4 and 5, and with his resolution of the jurisdictional question. Accordingly, except as modified in this Decision and in the rulings on exceptions contained in the attached Appendix, all of the Presiding Judge's findings of fact, and his conclusions with respect to items 1, 2 and 3 of the designation Order, are adopted. In order that our position with respect to the areas of disagreement may be fully understood, it is necessary that we set forth the pertinent facts.

6. Telephone is an independent connecting carrier which provides local telephone exchange service solely on an intrastate basis at Mound Bayou, Bolivar County, Mississippi. It also provides interstate telephone service through connection with the facilities of South Central Bell Telephone Company (Bell). Bell performs all handling, ticketing and calculations of billing of toll calls for the Mound Bayou exchange and cooperates in investigating disputed toll complaints by furnishing and examining their original toll tickets and verifying the calls with the party called.

7. Mrs. Tranquilli disputed two toll calls which appeared on her telephone bill carrying a billing date of December 1, 1970. By letter to Telephone of November 30, 1970, she refused to pay for said calls and deducted the charges therefor. After investigation, Telephone deducted the amount of the disputed calls in order to avoid expense and to maintain customer relations. On December 1, 1970, a "Final Past Due Notice" was sent to Mrs. Tranquilli which stated that unless the amount of $26.27 was paid by December 11, 1970, her telephone would be disconnected. The $26.27 is the same amount which was contained in her telephone bill bearing the billing date of December 1, 1970. The composition of that amount as shown on the latter bill was a $6.99 balance from a past bill, a $5.75 charge for local service, and amounts for toll calls and state and federal taxes. The $6.99 shown as past due was in error since Mrs. Tranquilli had paid all amounts owing from prior bills within 10 days of the billing dates and as of December 1, 1970, no amount from prior bills was outstanding.

8. The telephone bills sent to Mrs. Tranquilli and other subscribers of Telephone show an "amount now due" and an amount due after the

tenth of the month. The amount due after the tenth of the month is computed only by adding 10 percent of the "amount now due". The "amount now due" can be partially composed of amounts for interstate message toll service. The purpose, as stated by Telephone, of the 10% charge is to defray the handling and collecting of accounts paid after the tenth of the month. Mrs. Tranquilli has never paid the 10% charge for late payment. Telephone does not have any tariff on file with the Commission containing a 10% charge for late payment of bills for interstate message toll calls, but has had tariff authority from the Mississippi Public Service Commission since January 1969 to impose the 10% late payment charge to intrastate bills. The monthly bills sent to subscribers by the company stated the amount of the penalty charge on the total bill, including interstate calls, from January 1969 to August 1, 1971, when the company voluntarily discontinued applying the charge to interstate toll charges.

9. On January 20, 1968, the telephone service of Mrs. Tranquilli was discontinued by Telephone for refusal to pay the federal excise tax. As of the date of disconnection, the balance shown due on Telephone's records consisted exclusively of charges for the federal excise tax which had already been paid by the company to Internal Revenue Service. By letter dated January 15, 1968, Telephone stated: "We have your letters stating that you are deliberately withholding the excise tax because of your personal views relative to the tax. This is to advise you that we are required to collect the tax on telephone service regardless of personal opinions." Telephone service was restored to Mrs. Tranquilli on December 22, 1969. Mrs. Tranquilli has continued to withhold payment of the federal excise tax on telephone service.[4]

10. Mississippi Telephone and Communications, Inc. is listed as a connecting carrier in the American Telephone and Telegraph Company Tariff FCC No. 257. Section 2.4.3 of the AT&T Tariff FCC No. 263 provides that "Upon non-payment of any sum due the Telephone Company, or upon a violation of any of the conditions governing the furnishing of the service, the Telephone Company may by notice in writing to the customer, without incurring any liability, forthwith discontinue the furnishing of said service." This provision has been in effect since at least 1967. AT&T Tariff FCC No. 263 contains no exceptions relating to Mississippi Telephone and Communications, Inc.

11. In its introductory statement to its listed exceptions Telephone states that:

. . . No exception is taken to the Examiner's conclusions as to issues 1, 2 and 3 designated by the Commission for inquiry, because the Examiner has adopted the common conclusions of the Common Carrier Bureau and Respondents on these issues. The exceptions are thus limited to certain factual findings of the Examiner as to issues 4 and 5, and to the conclusions drawn from those facts. No exception is taken from the final results and conclusions reached by the Hearing Examiner, but exception is taken as to his reasons for reaching the decisions in Conclusions 3 and 4 and his position as to 'jurisdiction' in conclusion 5. . . .

[4] On September 19, 1969, the Commission had informed Telephone by letter that telephone companies are not required to force collection of the federal excise tax. By letter from its attorneys dated November 14, 1969, Telephone refused to restore service. On November 25, 1969, Telephone had been informed by letter that it was the opinion of the Commission's staff that the denial of service to Mrs. Tranquilli was a violation of Section 203 of the Communications Act.

In substance, Telephone excepts to the failure of the Presiding Judge (a) to conclude that the Commission has no jurisdiction over Telephone; (b) to conclude that there was no evidence that it had actually collected a late charge penalty from Mrs. Tranquilli or any other customer and, therefore, Section 203(c) had not been violated; and (c) to conclude that Telephone was not obligated to file a tariff as a "connecting carrier" and that Mrs. Tranquilli's refusal to reimburse Telephone for the excise tax which it had paid to the Internal Revenue Service was a failure to pay "a sum due" Telephone, thus justifying the disconnection of her telephone service.

12. No exceptions have been taken by the Bureau to the conclusions reached with respect to the items of inquiry 1, 2 and 3 of the designation Order. The Bureau does except to the Presiding Judge's failure (a) to find that the sending of customer bills containing a 10% penalty charge applicable to charges for interstate and foreign communications services violated Section 203(c) of the Act; (b) to order the payment of a forfeiture of at least $500 [5] pursuant to Section 203(e) for the penalty charge violation; (c) to order Telephone to refund all amounts collected as a penalty charge upon interstate and foreign communications charges in violation of Section 203(c); and (d) to order the payment of a forfeiture of at least $2,825 for violation of Section 203(c) resulting from the disconnection of Mrs. Tranquilli's telephone service.[6] Thus, the Bureau recommends a total forfeiture of $3,325.

13. Throughout this proceeding, Telephone has taken the position that the "Commission had no jurisdiction over it, because it is a connecting carrier operating solely in intrastate commerce, solely within the confines of the State of Mississippi, and, as such, subject to regulation only by Mississippi Public Service Commission. Its only activity in interstate commerce is through the connecting facilities of South Central Bell Telephone Company." The Board finds this position untenable and is of the view that the Commission's jurisdiction over Telephone in this proceeding is clear and unequivocal, as succinctly stated by the Bureau as follows, without the need for further discussion on our part:

> . . . the telephone company's reasoning seems to be that since Section 3 of the Act contains separate definitions of 'common carrier or carrier' (Section 3(h)) and 'connecting carrier' (Section 3(u)), that 'connecting carriers' are not 'common carriers' or 'carriers.' Therefore, it argues that only those sections of the Act which require or prohibit actions by 'connecting carriers' as such, apply to it. It finds that Section 2(b) limits the application of the Act to connecting carriers to Sections 201–205. The only obligation therein imposed specifically upon connecting carriers is the requirement of Section 203(a) that it keep open for public inspection the tariff schedules filed by fully subject carriers and furnished to connecting carriers. This argument is remarkably similar to the one rejected by the court

[5] In its Proposed Conclusions and Recommendations, the Bureau estimated that the maximum forfeiture which can be calculated from the data on record would be $10,000. Because of Telephone's reliance in good faith on its Mississippi tariff and the cooperation of the U.S. Independent Telephone Association, the Bureau recommended that a "forfeiture of $500 will be sufficient with respect to the penalty charge violation."

[6] The Bureau estimated a maximum forfeiture of $18,000. However, it recommended a lesser amount because of the size of Telephone's operation. Thus, the Bureau recommended that in addition to a penalty of $500 for disconnection of service, the period of continuance be computed from September 19, 1969, the date on which the Commission's staff notified Telephone that it was not required to attempt to enforce payment of the tax but need only report the refusal to pay the tax to the Internal Revenue Service. The $2,825 figure consists of $500 plus 93 days at $25 per day.

in the case of *Ward* v. *Northern Ohio Telephone Company*, 300 F. 2d 816 (6th Cir.) *cert. denied*, 371 U.S. 820 (1962), wherein it stated: '. . . Sections 201–205 of the Act, relating to services, charges, unlawful discriminations and preferences apply to *any* carrier which is engaged in interstate communications solely through physical connection with the facilities of another carrier. . . .' 300 F. 2d at 820 (emphasis added); *accord, Idaho Microwave Inc.* v. *F.C.C.*, 352 F. 2d 729 (D.C. Cir. 1965). The telephone company's argument, in addition to being contrary to the case law and the plain language of the statute, would lead to the absurd conclusion that a connecting carrier is obligated to post for public inspection the interstate charges of the filing carrier's tariff, but is not obligated to apply those same charges. The company's jurisdictional challenges are thus wholly without merit.

See also *General Telephone Company of California* v. *FCC*, 413 F. 2d 390 (D.C. Cir. 1969), *cert. denied*, 90 S. Ct. 173, 178 (1969).

14. The Presiding Judge limited his consideration of Telephone's liability for forfeiture to "item 5 dealing with the payment of the telephone excise tax" on the ground that such liability was mentioned by the Commission only with respect to said tax payment. With respect to Telephone's imposition of a late payment penalty charge (item 4), the Presiding Judge concluded that forfeiture would not be appropriate because of lack of notice to Telephone; because no charge had been collected from Mrs. Tranquilli; and because Telephone had discontinued the practice. We are of the view that, for the reasons set forth below, adequate notice of potential forfeiture had been given to Telephone; that a finding that Section 203(c) of the Act had been violated was not dependent on Telephone's collection of the penalty; that, in the circumstances of this case, Telephone's discontinuance of said practice should not be a bar to the imposition of a forfeiture but should be considered as a mitigating factor; and that refunds of collected penalties, if any, should be made in accordance with practicable procedures.

15. In paragraph 4(b) of its designation Order, the Commission referred to Telephone's penalty charge and stated "Since no such charge is shown for interstate calls in American Telephone and Telegraph Company's Tariff F.C.C. No. 263, the imposition of a penalty charge would constitute a violation of Section 203(c) of the Communications Act." In framing inquiry item 4, the Commission again put Telephone on notice of that potential finding of violation. Section 203(c) states, in pertinent part, that ". . . no carrier shall (1) charge, demand, collect *or* receive a greater or less or different compensation . . . than the charges specified in the schedule." (Italic added.) It is fundamental that, giving words their plain meaning, the use of the conjunction "or" makes any excess "charge", or any excess "collection", a violation of said section,[7] which violation is subject to the forfeitures set forth in Section 203(e). Telephone admitted, in the above-mentioned Stipulation (Joint Exhibit 1), that the penalty charge appeared on its subscribers' bills from January 1969 to August 1, 1971. Those charges, whether or not collected, constituted violations of Section 203(c) which is self-operative. In light

[7] The word "or" is a disjunctive particle that marks an alternative. *Ohio Fuel Supply Co.* v. *Paxton*, 1 F. 2d 662, 664 (1924); *State of South Carolina* v. *Pilot Life Insurance Company*, 186 S.E. 2d 262 (1972).

of all of the above, we believe that the Bureau's recommended forfeiture for said violations was reasonable, and consistent with the public interest.

16. Telephone argues against the issuance of any order requiring it to refund unlawfully collected penalty charges on the ground that such a requirement was not raised in the designation Order and that the record does not show that any penalties were collected. We believe that, consistent with human experience, it is reasonable to presume that since penalty charges were billed by Telephone from January 1969 to August 1, 1971, some of those charges were collected, particularly in light of the fact that Telephone has not denied such collections. Refunding of unlawful collections has long been recognized in common carrier and public utility cases. A refunding order is the exercise of an inherent equity power of the Commission and the expected compliance with such a requirement is a mitigating factor which may be considered in assessing a forfeiture. See Order in *Benefiel* v. *General Telephone Company of California*, No. 70–1815–RJK, attached to Bureau's brief. We believe that the procedure which we have provided for the widest practicable refund of unlawful collections is more conducive to an expeditious resolution of the questions raised in these proceedings and should be more acceptable to Telephone than were we to leave recovery of the excess charges to individual state law suits or to individual complaint proceedings before the Commission.

17. As stated above, Mrs. Tranquilli's telephone service was disconnected by Telephone from January 20, 1968 to December 22, 1969 because she refused to pay the federal excise tax on her telephone bills and refused to reimburse Telephone after it paid said tax to the Internal Revenue Service. It was Telephone's position that Mrs. Tranquilli's action constituted a refusal to pay a "sum due the telephone company." We cannot accept this argument and agree with the position of the Bureau that, at the time of the disconnection, the Internal Revenue Service did not, by practice or regulation, require Telephone to enforce payment of the tax and that the company was without authority to enforce such payment. The Internal Revenue Service Procedural Rules (Section 601.403(c)(2)) provided, in pertinent part, that:

> . . . If the person from whom the tax is required to be collected refuses to pay it . . . the collecting agency is required to report [the facts] to the district director of internal revenue. . . . Upon receipt of this information the district director will proceed against the person to whom the facilities were provided or the services rendered to assert the amount of tax due, affording such person the same district conference, protest and appellate rights as are available to other excise taxpayers. . . .

Telephone could not eliminate such taxpayer rights by paying the tax and enforcing reimbursement by means of service disconnection. Thus, it is clear that the excise tax which Mrs. Tranquilli refused to pay was *not* a "sum due the Telephone Company" within the meaning of the American Telephone and Telegraph Company's Tariff F.C.C. No. 263. Therefore, the disconnection of her telephone service, including

interstate telephone service, solely on account of her refusal to pay the excise tax or to reimburse Telephone was without authority under the tariff and constituted a violation of Section 203(c). Cf. *Johnson* v. *Southwestern Bell Telephone Company*, 18 FCC 2d 679, 16 RR 2d 941 (1969).

18. In light of all of the above, we conclude that a forfeiture of $500 should be imposed on Telephone pursuant to Section 203(e) of the Act for violation of Section 203(c) in sending customers bills containing a 10% penalty charge applicable to interstate communications services; that Telephone should be required to refund, wherever possible, all amounts collected as penalty charges on interstate and foreign communications charges, and to maintain appropriate records concerning such refunds; and that a forfeiture of $2,825 should be imposed on Telephone for violation of Section 203(c) resulting from its disconnection of Mrs. Tranquilli's telephone service.

19. Accordingly, IT IS ORDERED, That Mississippi Telephone and Communications, Inc., owner and operator of the local telephone exchange facility located at Mound Bayou, Mississippi, FORFEIT to the United States the sum of three thousand three hundred and twenty-five dollars ($3,325.00) for violation of Section 203(c) of the Communications Act of 1934, as amended; and that payment of said forfeiture shall be made by delivering to the Commission within thirty (30) days of the date of receipt of this Decision a check or similar instrument drawn to the order of the Treasurer of the United States; and

20. IT IS FURTHER ORDERED, That (a) Mississippi Telephone and Communications, Inc., shall, within ninety (90) days of the date of receipt of this Decision refund to all persons who were its subscribers between January 1, 1969 and August 1, 1971, all amounts collected during said period as penalty charges upon interstate and foreign telephone service charges;

(b) If sufficient company or other records are not available to permit compliance with (a) above, said company shall, within thirty (30) days of the date of receipt of this Decision, notify its present subscribers and all others who had been subscribers between January 1, 1969 and August 1, 1971, that it will pay refunds to those subscribers who can produce records of having paid such penalty charges;

(c) Within six (6) months of the date of receipt of this Decision, said company shall submit to the Commission a complete and detailed report indicating the extent of its compliance with the above requirements;

(d) The company shall notify the Commission of its receipt of this Decision within five (5) days thereof; and

21. IT IS FURTHER ORDERED, That the Secretary of the Commission send copies of this Decision by Certified Mail—Return Receipt requested to Mississippi Telephone and Communications, Inc., Marion, Louisiana 71260, and to its attorney, Charles H. Ryan, P.O. Box 4065, Monroe, Louisiana 71201.

JOSEPH N. NELSON,
Member, Review Board,
Federal Communications Commission.

109-018—72——8

APPENDIX

Rulings on Exceptions to Initial Decision

Exceptions of Mississippi Telephone and Communications, Inc.

Exception No.	*Ruling*
1	*Granted* to the extent that the Presiding Judge should have resolved the jurisdictional question on the merits and *Denied* in all other respects for the reasons set forth in the Decision.
2, 3	*Denied* in substance for the reasons set forth in the Decision.

Exceptions of Chief, Common Carrier Bureau

1, 2, 3, 4	*Granted.*

F.C.C. 72D-29

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In the Matter of COMPLAINT OF MRS. MARTHA TRANQUILLI, MOUND BAYOU, MISS., AGAINST MISSISSIPPI TELEPHONE AND COMMUNICATIONS, INC.; MOUND BAYOU TELEPHONE CO., MARION, LA.; CENTRAL TELEPHONE AND ELECTRONICS CORP., MONROE, LA.	Docket No. 19271

APPEARANCES

Charles H. Ryan, Esq., on behalf of Mississippi Telephone and Communications, Inc.; and *Karl J. Cangelosi, Esq.*, on behalf of the Chief, Common Carrier Bureau, Federal Communications Commission

INITIAL DECISION OF HEARING EXAMINER ERNEST NASH

(Issued May 4, 1972; Released May 10, 1972)

1. In its Order released June 29, 1971, the Commission instituted a formal investigation into matters set forth in an informal complaint of Mrs. Martha Tranquilli. The Commission outlined the nature of the complaints made by Mrs. Tranquilli and expressed its concern over the inadequacy of the response received from the telephone company involved to staff letters which sought information relative to Mrs. Tranquilli's complaint. According to the Commission's Order it appeared that the carrier was unwilling to cooperate in resolving the questions raised by Mrs. Tranquilli's complaint through the informal complaint procedures. The Commission concluded that it was necessary to institute a formal investigation ". . . in order that the questions do not go unresolved for want of the carriers voluntary cooperation." The Commission also stated in the Order that since it was necessary to commence a formal investigation concerning practices of the telephone company which were the subject of Mrs. Tranquilli's complaint, it was also appropriate ". . . to consider whether a notice of liability to forfeiture should be issued for the company's disconnection in 1969 of Mrs. Tranquilli's service because she refused to pay the federal excise tax on her telephone bill." In its Order the Commission directed that a hearing be held pursuant to Sections 201, 202, 203, 208 and 403 of the Communications Act of 1934, as amended. The Hearing Examiner designated was directed to prepare an Initial Decision which was subject to exceptions and oral argument before the Review Board.

2. Without in any way limiting the scope of the proceeding the Commission ordered that it include inquiry into the following:

"1. Whether the use of the application form given to Mrs. Tranquilli was part of an unjust or unreasonable practice in violation of Section 201 (a) or (b) of the Act or demonstrates that Mississippi Telephone and Communications, Inc., and its affiliates are or have been engaged in unjust and unreasonable discrimination in violation of Section 202(a) of the Act;

"2. Whether Mrs. Tranquilli has been incorrectly billed for interstate telephone service and whether the telephone company has failed to make reasonable investigation into her complaints relating thereto, in violation of Sections 201(b), 202(a) and 203(c) of the Act;

"3. Whether the sending of the disconnection notice to Mrs. Tranquilli was unreasonable under the circumstances so as to constitute a violation of Section 201(b) of the Act or was unjustly discriminatory contrary to Section 202(a) of the Act;

"4. Whether the telephone company or any of its affiliates has, by imposing a late payment penalty charge, imposed a charge on interstate communications other than that set forth in the appropriate filed tariff in violation of Section 203(c) of the Act;

"5. Whether the disconnection of service to Mrs. Tranquilli in 1969 because of her refusal to pay the federal telephone excise tax was a violation of Section 203(c) of the Act."

3. A prehearing conference was held on August 17, 1971. At that conference an appearance was entered by Charles H. Ryan, Esq. In response to a request from the Examiner, Mr. Ryan stated that his appearance was on behalf of two entities; Century Telephone Enterprises Incorporated, a telephone holding company and Mississippi Telephone and Communications, Inc., which is a subsidiary of Century. At the prehearing conference, the parties agreed to an indefinite continuance of the hearing in order to enable the parties to enter into a stipulation of fact with regard to the matters encompassed by the formal proceeding which had been instituted by the Commission.

4. On February 25, 1972, the Hearing Examiner received a Stipulation of Facts which represented agreements reached between the parties to the proceeding. A copy of the Stipulation of Facts was sent to the informal complainant, Mrs. Martha Tranquilli. In an Order released March 14, 1972, the Stipulation of Facts was identified as Joint Exhibit 1, made a part of the record and received into evidence. With that, the evidentiary record was closed and the parties were directed to file proposed conclusions by April 17, 1972. They were also directed to file copies of their proposed conclusions upon Mrs. Tranquilli. Proposed conclusions were duly filed on behalf of the Chief, Common Carrier Bureau, and the respondents, Mississippi Telephone and Communications, Inc., and Century Telephone Enterprises Incorporated. Findings of Fact are made herein by adoption of the stipulation entered into by the parties to this proceeding and received into evidence by the Order of March 17, 1972.

FINDINGS OF FACT

5. Mississippi Telephone and Communications, Inc., is the corporate name of the corporation which owns and operates the local telephone exchange facility located at Mound Bayou, Mississippi. This company provides telephone service to Mrs. Martha Tranquilli. It is an independent connecting carrier providing local telephone exchange service solely on an intra-state basis at Mound Bayou, in Bolivar County, Mississippi, and interstate telephone service through connection with the facilities of South Central Bell Telephone Company.

6. Prior to the purchase of the telephone facilities in Mound Bayou by the Mississippi Telephone and Communications, Inc., those facilities were owned and operated by the Mound Bayou Telephone Company. That company does not now own any of the facilities in Mound Bayou and the use of the name "Mound Bayou Telephone Company" on recent telephone bills to subscribers in Mound Bayou is incorrect. All of the events involved with the five issues designated by the Commission relate to time periods after Mississippi Telephone and Communications, Inc. bought the facilities in Mound Bayou from the Mound Bayou Telephone Company.

7. All of the stock of the Mississippi Telephone and Communications, Inc. is owned by Century Telephone Enterprises, Inc. Prior to September, 1970, the Century Telephone Enterprises, Inc. was known as Central Telephone and Electronics Corporation. The two names refer to the same corporate entity.

8. The application form referred to in issue 1 is designated as Southern Bell Form 3071(r–1) (Oct. 1942). This form was given to Mrs. Tranquilli on December 22, 1969, for her completion and was used only on this one occasion. Its use on this one occasion is described in the affidavit of W. P. Smith, Vice President, Commercial, with Century Telephone Enterprises, Inc., supplied in response to interrogatories filed by the Common Carrier Bureau. The affidavit provides, in part:

"I was instructed by Mr. Clarke M. Williams, President of Century Telephone Enterprises, Inc., to go to Mound Bayou, Mississippi and to take all necessary steps to restore telephone service to Mrs. Tranquilli. After arriving at Mound Bayou, Mississippi on December 22, 1969, I went out to the residence of Mrs. Tranquilli in Mound Bayou, Mississippi with Alfred Smith, the installer-repairman for the Mississippi company. Our local office in Mound Bayou did not have any application forms, and did not have any other regular forms for application for service that we use throughout our telephone system. I therefore, drove to Marigold, Mississippi, which is a small town about six (6) miles from Mound Bayou, and there I consulted with a friend of mine who is the manager of the local Marigold, Mississippi telephone company. I asked him to let me use one of his application blanks but he also failed to have any. However, after searching around his office and in his desk, he was able to come up with an old Southern Bell Telephone form which he freely gave me. This was Southern Bell Form 307(r–1) (Oct., 1942), Application for New or Additional Service. Without giving any particular study to the form, I took it back with me to Mound Bayou and gave it to Mrs. Tranquilli and asked her to sign it and mail it in to the company at her convenience."

9. The application form regularly used by the Telephone Company does not contain any reference to the race of an applicant for service. Notations of the race of customers are not made on any of the Telephone Company's records.

10. Mrs. Tranquilli disputed two calls appearing on her telephone bill with a billing date of 12/1/70. One call was designated as "HOUSTON FM CAMBDGE MS 713–526–2811 10/28 $2.00 nn2059058" and the other as "PHILA 215–563–7110 10/20 $1.15 001532". The designation of the Houston call indicates that it was a third party call from Cambridge, Massachusetts. The dispute was brought to the attention of the Telephone Company by a letter dated November 30, 1970, signed by Mrs. Tranquilli in which she denied any knowledge of a call from "Cambridge, Mississippi", and both she

and the Commission were unable to locate any town by that name in the State of Mississippi. Mrs. Tranquilli deducted the amount of the disputed calls from the payment made on the telephone bill in question. After investigation, the Telephone Company deducted the amount of the disputed calls from Mrs. Tranquilli's bill in order to avoid expense of additional inquiry and to maintain good customer relations with Mrs. Tranquilli, even though the toll tickets indicated that the calls had in fact been placed. On all other occasions when Mrs. Tranquilli has disputed making a call listed on her telephone bill, the Telephone Company has deducted the amount of the disputed call from the bill in question.

11. The Telephone Company has not developed any written set of practices with respect to disputed toll calls. If the amount of the dispute is small, and the customer complains infrequently about toll charges, credit is usually given to them without any investigation in order to maintain good will and minimize the expense of investigation. If the amount is more substantial, or many calls are disputed, the calls are investigated usually by calling the other party involved for verification purposes. South Central Bell Telephone Company performs all handling, ticketing and calculations of the billing of toll calls for the exchange servicing Mrs. Tranquilli. This company cooperates in investigating disputed toll complaints by furnishing and examining their original toll tickets and verifying the calls with the party called.

12. On December 1, 1970, a "Final Past Due Notice" was sent to Mrs. Tranquilli. It stated that unless the amount of $26.47 was paid by December 11, 1970, her telephone would be disconnected. The amount of $26.47 is the same amount that appeared on Mrs. Tranquilli's telephone bill with a billing date of 12/1/70. The composition of that amount as shown on the 12/1/70 bill was a $6.99 balance from a past bill, a $5.75 charge for local service, and amounts for toll calls and state and federal taxes. The amount of $6.99 shown on the bill as past due was in error. Mrs. Tranquilli had paid all amounts owing from prior bills within 10 days of the billing dates and as of 12/1/70 no amount from prior bills was outstanding.

13. The billing in question is handled by computer operations and the mistake resulted from error. If the amount of $6.99 had been due and owing from a past bill as of 12/1/70, the sending of the "Final Past Due Notice" in the amount of $26.47 would have been in accordance with Telephone Company practice. If the Telephone Company's computer records had accurately reflected that no amount was past due and owing, the sending of the "Final Past Due Notice" would not have been in accordance with Telephone Company practice.

14. The telephone bills sent to Mrs. Tranquilli and other subscribers of the Telephone Company show an "amount now due" and an amount due after the tenth of the month. The amount due after the tenth of the month is computed by adding 10 percent of the "amount now due" to that amount. The "amount now due" can be partially composed of amounts for interstate message toll service. The purpose as stated by the Telephone Company of the 10% charge is to defray the handling and collecting of accounts paid after the

tenth of the month. Mrs. Tranquilli has never incurred the 10% charge for late payment. The Telephone Company does not have any tariff on file with the Federal Communications Commission containing a 10% charge for late payment of interstate message toll calls, but has had tariff authority from the Mississippi Public Service Commission since January 1969 to impose the 10% late payment charge to intrastate bills since January 1969. The monthly bills sent to subscribers by the company stated the amount of the penalty charge on the total bill, including interstate calls, from January 1969 to August 1, 1971, when the company voluntarily discontinued applying the charge to interstate toll charges.

15. On January 20, 1968, the telephone service of Mrs. Tranquilli was disconnected by the Telephone Company for refusal to pay the Federal Excise Tax on the telephone service. As of the date of disconnection, the balance shown due on the Telephone Company records consisted exclusively of charges for the Federal Excise Tax on telephone service which had already been paid by the company to I.R.S. By letter dated January 15, 1968, the Telephone Company stated: "We have your letters stating that you are deliberately withholding the excise tax because of your personal views relative to the tax. This is to advise you that we are required to collect the tax on telephone service regardless of personal opinions." Telephone service was restored to Mrs. Tranquilli on December 22, 1969. Mrs. Tranquilli has continued to withhold payment of the Federal Excise Tax on telephone service. On September 19, 1969, the Commission informed the Telephone Company by letter that telephone companies are not required to force collection of the Federal Excise Tax. On November 25, 1969, the Telephone Company was informed by letter that it was the opinion of the Commission's staff that the denial of service to Mrs. Tranquilli was a violation of Section 203 of the Communications Act.

16. Mississippi Telephone and Communications, Inc. is listed as a connecting carrier in the American Telephone and Telegraph Company Tariff FCC No. *257*. Section 2.4.3 of the AT&T Tariff FCC No. *263* provides that "Upon non-payment of any sum due the Telephone Company, or upon a violation of any of the conditions governing the furnishing of the service, the Telephone Company may be notice in writing to the customer, without incurring any liability, forthwith discontinue the furnishing of said service." This provision has been in effect since at least 1967. AT&T Tariff FCC No. 263 contains no exception provisions relating to Mississippi Telephone and Communications, Inc.

CONCLUSIONS

1. Based upon the foregoing stipulated facts, there is no real dispute between the parties to this proceeding regarding the conclusions to be drawn from the stipulated facts as to the first 3 items designated by the Commission for inquiry. Common Carrier Bureau's conclusions as to the items numbered 1, 2 and 3 are, therefore, adopted. These conclusions are:

A. The facts involved in the use of the application form do not reflect an unjust or unreasonable practice in violation of Section 201(a) or (b) of the Communications Act, nor do they reflect an unjust or unreasonable practice in violation of Section 202(a) of the Communications Act.

B. The record reflects that Mrs. Tranquilli's dispute of the calls as not placed or authorized by her was in good faith and that the Telephone Company did not fail to make a reasonable investigation of her complaints. Under such circumstances it can be concluded that there was no violation of the Act.

C. The sending of the disconnection notice on December 1, 1970 was the result of an error based on inaccurate records. There is no indication that the disconnection notice was sent to harass or annoy Mrs. Tranquilli or was part of a general deterioration of the billing process. When the error was brought to the attention of the Telephone Company, the records were corrected. In view of these facts we conclude that the error was not a violation of the Act.

2. In its Order of Designation the Commission in Paragraph 5, thereof, stated that it would be appropriate ". . . to consider whether a notice of liability to forefeiture should be issued for the company's disconnection in 1969 of Mrs. Tranquilli's service because she refused to pay the federal excise tax on her telephone bill." It is, therefore, concluded that for the purposes of this proceeding the only item under which a notice of liability to forefeiture may be issued is item 5 dealing with the payment of the telephone excise tax.

3. With respect to item number 4 it is concluded that while respondent did for a period send out customer bills which contained a 10 percent penalty charge and which may have been applied to charges for interstate or foreign communications services, such a charge was not collected from Mrs. Tranquilli. This practice has been discontinued. A notice of liability for forefeiture would not be appropriate under the circumstances since the Commission did not give the respondent specific notice that such liability may arise out of this proceeding and, in any event, the practice complained of has been discontinued.

4. Respondent's insistence upon requiring payment of federal excise tax and the disconnection of service to Mrs. Tranquilli in 1969 because of her refusal to pay the federal excise tax was a violation of Section 203(c) of the Act. This violation arose by reason of the misconception by the Telephone Company of its obligation to the federal government with respect to the collection of the excise tax. Once the matter was called to its attention by the Commission's staff, it changed its practice. Its operations and practices are now consistent with the requirements of Section 203(c) and its obligations as a connecting carrier under the American Telephone and Telegraph Company's applicable interstate tariffs. It is concluded that a forefeiture would not be appropriate and none will be proposed.

5. In its proposed conclusions the respondent challenges the jurisdiction of the Commission over it in view of its status as an intrastate and connecting carrier. This question has been rendered moot by reason of the respondent's participation in the proceeding and the actions taken by it to affect compliance with the requirements of the Federal Communications Act with respect to the interstate services which it does provide as a connecting carrier.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Review Board reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, this proceeding IS TERMINATED.

ERNEST NASH,
Hearing Examiner,
Federal Communications Commission.

F.C.C. 72–1036

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WALTON BROADCASTING CO. (WMRE), MONROE, GA. For Renewal of License	Docket No. 19011 File No. BR–2938

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 27, 1972)

BY THE COMMISSION:

1. On October 2, 1970, the Commission designated for hearing on a number of issues the application of Walton Broadcasting Company (Walton) for renewal of the license for standard broadcast station WMRE, Monroe, Georgia. FCC 70–1027. The issues designated by the Commission inquired into whether Walton had filed false and misleading information with the Commission, whether Walton or its principals had participated in a strike application, and whether there had been an unauthorized transfer of control of station WMRE. Thereafter, Walton filed a petition seeking reconsideration of the designation order and a grant of its renewal application without hearing, subject to a condition that the principals of Walton, Mr. Warren G. Gilpin and Mrs. Clarice Pritchard, divest themselves of their broadcast interests. The basis of Walton's petition was that Mr. Gilpin, a 50% owner and President of Walton and general manager of WMRE, was physically and mentally unable to participate in the hearing or to aid Walton in its preparation for hearing. The Commission denied the petition for reconsideration, holding that the evidence did not show that Gilpin was disabled to the extent claimed and that Walton would not be deprived of due process because of limitations upon Gilpin's activities necessitated by his health. 28 FCC 2d 111 (1971).

2. Accordingly, the hearing commenced and testimony, including that of Gilpin, was taken in Monroe, Georgia, on June 23–28, 1971. At that time, the hearing was continued in order to permit Walton's counsel to arrange for the production of medical testimony in Washington, D.C. On October 18, 1971, Administrative Law Judge Isadore A. Honig granted Walton's request for an indefinite continuance of the hearing, pending presentation to the Commission of a plan for the disposition of Walton. FCC 71M–1658. Meanwhile, on October 2, 1971, Henry P. Austin, Jr., on the petition of the National Bank of Monroe, was appointed by the Walton County Superior Court as the permanent receiver of the corporate assets of Walton and of the individual assets of Gilpin. On October 26, 1971, the Commission granted the

B. The record reflects that Mrs. Tranquilli's dispute of the calls as not placed or authorized by her was in good faith and that the Telephone Company did not fail to make a reasonable investigation of her complaints. Under such circumstances it can be concluded that there was no violation of the Act.

C. The sending of the disconnection notice on December 1, 1970 was the result of an error based on inaccurate records. There is no indication that the disconnection notice was sent to harass or annoy Mrs. Tranquilli or was part of a general deterioration of the billing process. When the error was brought to the attention of the Telephone Company, the records were corrected. In view of these facts we conclude that the error was not a violation of the Act.

2. In its Order of Designation the Commission in Paragraph 5, thereof, stated that it would be appropriate ". . . to consider whether a notice of liability to forefeiture should be issued for the company's disconnection in 1969 of Mrs. Tranquilli's service because she refused to pay the federal excise tax on her telephone bill." It is, therefore, concluded that for the purposes of this proceeding the only item under which a notice of liability to forefeiture may be issued is item 5 dealing with the payment of the telephone excise tax.

3. With respect to item number 4 it is concluded that while respondent did for a period send out customer bills which contained a 10 percent penalty charge and which may have been applied to charges for interstate or foreign communications services, such a charge was not collected from Mrs. Tranquilli. This practice has been discontinued. A notice of liability for forefeiture would not be appropriate under the circumstances since the Commission did not give the respondent specific notice that such liability may arise out of this proceeding and, in any event, the practice complained of has been discontinued.

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5. In its proposed conclusions the respondent challenges the jurisdiction of the Commission over it in view of its status as an intrastate and connecting carrier. This question has been rendered moot by reason of the respondent's participation in the proceeding and the actions taken by it to affect compliance with the requirements of the Federal Communications Act with respect to the interstate services which it does provide as a connecting carrier.

Accordingly, IT IS ORDERED that unless an appeal from this Initial Decision is taken by a party to the proceeding, or the Review Board reviews the Initial Decision on its own motion in accordance with the provisions of Section 1.276 of the Rules, this proceeding IS TERMINATED.

ERNEST NASH,
Hearing Examiner,
Federal Communications Commission.

F.C.C. 72–1036

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Application of WALTON BROADCASTING CO. (WMRE), MONROE, GA. For Renewal of License	Docket No. 19011 File No. BR–2938

MEMORANDUM OPINION AND ORDER

(Adopted November 22, 1972; Released November 27, 1972)

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2. Accordingly, the hearing commenced and testimony, including that of Gilpin, was taken in Monroe, Georgia, on June 23–28, 1971. At that time, the hearing was continued in order to permit Walton's counsel to arrange for the production of medical testimony in Washington, D.C. On October 18, 1971, Administrative Law Judge Isadore A. Honig granted Walton's request for an indefinite continuance of the hearing, pending presentation to the Commission of a plan for the disposition of Walton. FCC 71M–1658. Meanwhile, on October 2, 1971, Henry P. Austin, Jr., on the petition of the National Bank of Monroe, was appointed by the Walton County Superior Court as the permanent receiver of the corporate assets of Walton and of the individual assets of Gilpin. On October 26, 1971, the Commission granted the

involuntary assignment of the license of WMRE from Walton to Austin.

3. Now before the Commission is a Petition for Extraordinary Relief [1] filed by Henry P. Austin, Jr. (Austin) seeking: (1) termination of the hearing on the license renewal application for WMRE; (2) a grant without further hearing of the license renewal; and (3) approval of the assignment of the license for WMRE from Austin to three Monroe, Georgia, residents. In the petition, Austin states that Mr. Gilpin has been found in accordance with Georgia law [2] to be mentally ill and incapable of managing his own estate, and as a consequence has been committed to the Central State Hospital at Milledgeville, Georgia.[3] Austin argues that illness and incapacity have been recognized by the Commission as a basis for granting exceptions to the general policy of not allowing an assignment of a broadcast license while there are character issues outstanding against the licensee or its principals.[4] Thus, Austin argues that, considering Mr. Gilpin's physical and mental ill health and the fact that he has been committed to a mental institution, the Commission should not proceed with the hearing on the renewal application for WMRE but rather should grant the renewal and approve the requested assignment of the station. As further support for his petition, Austin states that Mr. Gilpin and Walton are currently bankrupt, and that only through a sale of WMRE can their innocent creditors ever recover the sums owed them. Moreover, Austin alleges that if the renewal application for the station were to be ultimately denied, Mr. Gilpin would be rendered destitute, and, as a consequence, the State of Georgia would be forced to bear the entire cost of his hospitalization. In this regard, Austin states that, if the assignment is approved, no profit will accrue to Mr. Gilpin since any surplus funds from the sale would be paid into an irrevocable trust with the income therefrom going to the Georgia Central State Hospital to help defray the cost of Mr. Gilpin's hospitalization.

4. We do not believe that the above allegations justify our granting the license renewal application for WMRE and the proposed assignments of the station while serious questions concerning the character qualifications of Mr. Gilpin and Walton remain unresolved. It is our firm and long-established policy that an assignment of a broadcast license will not be considered while issues concerning the character qualifications of the licensee or its principals are outstanding.[5] It was

[1] Other pleadings before the Commission are (1) comments on the petition filed by the Chief, Broadcast Bureau, on August 31, 1972; (2) an opposition filed by Community Broadcasting Company on August 31, 1972; (3) comments filed by Charles M. Haasl, James N. Williamson and Raymond L. Dehler on August 31, 1972; (4) a supplemental response filed by the Chief, Broadcast Bureau on September 13, 1972; and (5) a reply by Henry P. Austin, Jr. on October 10, 1972. The Chief, Broadcast Bureau requested leave to file his supplemental response. There is no opposition to such request, and it will be granted.

[2] Citing Sections 88–507.2 and 88–507.3 of the Georgia Code.

[3] Attached to Austin's petition is a certified copy of the judicial order committing Mr. Gilpin to the Central State Hospital. Also attached is an affidavit of Dr. Carl L. Smith, Unit Director at the Central State Hospital, wherein Dr. Smith states that Mr. Gilpin is suffering from, among other ailments, organic brain syndrome associated with alcohol paranoid state, alcoholic addiction, drug dependence, and several damaged organ systems.

[4] Citing *Martin R. Karig*, FCC 64–850 3 RR 2d 669 (1964) and *Tinker, Inc.*, 8 FCC 2d 22 (1967).

[5] See *Jefferson Radio Co., Inc.* v. *F.C.C.*, 340 F. 2d 781 (1964); *Tidewater Teleradio*, 24 RR 653 (1962); and *Milton Broadcasting Co.*, 12 FCC 2d 354 (1968). We note here that, while technically Mr. Austin is now the licensee of Station WMRE, he became such subject to the issues which had already been designated against Walton at the time Mr. Austin became the licensee. See *Capital City Communications, Inc.*, 33 FCC 2d 703; recon. denied 34 FCC 2d 685 (1972).

on the basis of this policy that we denied Walton's petition for reconsideration of the designation order in this case. Austin, in his instant petition, seeks essentially the same relief as that sought by Walton in its petition for reconsideration, and the only new allegations which Austin makes are: (1) those concerning Mr. Gilpin's commitment to a mental institution, and (2) that Mr. Gilpin will not profit from the proposed assignment since any surplus funds will be deposited in an irrevocable trust. As for the first allegation, we note that the extent to which Mr. Gilpin is now incapacitated is the subject of some controversy. Apparently, Mr. Gilpin currently is capable of full-time employment and is also able to drive an automobile.[6] Thus, it would appear that Mr. Gilpin's disability is somewhat less than total. Moreover, the hearing in this case, including the testimony of Mr. Gilpin, is substantially completed and the remaining hearing process will not in our opinion unduly burden Mr. Gilpin nor seriously jeopardize his health. Thus, we must conclude, as we did in our denial of Walton's petition for reconsideration, that the allegations regarding Mr. Gilpin's health are insufficient to warrant a termination of the hearing and a grant of the proposed assignment.

5. While we are sympathetic to Mr. Gilpin's desire not to become a burden on the State of Georgia, we do note that he is currently employed and earning a salary of $68.00 per week.[7] Moreover, we also note that the contract of sale provides that $61,000 of the $151,000 sales price is to be paid in ten equal installments to Preston Gilpin as guardian *ad litem* and trustee for Warren G. Gilpin. This money, the contract states, is to be placed in an irrevocable trust "for the care and maintenance of the said Warren G. Gilpin." This sum must be regarded as a profit to Mr. Gilpin from the sale of the station since, while he may not have immediate access to this money, he clearly will benefit from its use.[8] Thus, the proposed sale violates our stricture against sanctioning a license assignment which will result in a significant benefit to a putative wrongdoer.[9] While we have stated that an assignment may be

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[6] The Broadcast Bureau suggests that Austin has attempted to perpetrate "an outrageous fraud on this Commission" by falsely claiming that Gilpin is severely disabled and without a current source of income. The Bureau requests that an existing issue, which inquires into whether false and misleading information has been submitted to the Commission by Walton, be broadened in order to determine whether Austin has submitted such information in his petition for extraordinary relief. However, in his reply to the Bureau's pleading, Austin states that when he submitted the instant petition he had no knowledge of Gilpin's employment and that he was relying upon medical opinions as to Gilpin's condition. We have concluded that Austin's reply satisfactorily explains his prior statements and that no purpose would be served by initiating the inquiry requested by the Bureau. Of course, this conclusion does not obviate the need for resolution of the presently designated issues.

[7] See Reply of Henry P. Austin, Jr., Ex. 2.

[8] The remainder of the sales price, $91,000, is to be paid to Henry P. Austin, Jr. as receiver for Walton and Mr. Gilpin. Presumably, this money will be used to pay the debts of Walton, amounting to approximately $42,000 and to extinguish partially the debts of Mr. Gilpin, which amount to approximately $94,700. To the extent that the proceeds from the sale would be used to relieve Mr. Gilpin of either secondary liability for Walton's debts or of primary liability for his own, such use would violate our policy of not allowing a benefit from a license assignment to accrue to a principal against whom character issues are outstanding. See *Capital City Communications, Inc.*, 33 FCC 2d 703; recon. denied, 34 FCC 2d 685 (1972).

[9] See *Capital City Communications, Inc., supra*, and *Milton Broadcasting Co., supra*. The element of profit distinguishes this case from *Martin R. Karig, supra*, and *Tinker, Inc., supra*, cited by Austin. In those two cases, the Commission found that no profit would accrue to the stations' principals from the sales of the stations. Furthermore, in *Tinker*, the Commission also found that an evidentiary hearing would seriously worsen the ill principal's condition, and that he was unable to assist in his own defense at the hearing, whereas in the instant case the hearing is substantially completed, and there has been no allegation that completion of the hearing would endanger Gilpin's health.

granted where the principal involved will receive "only a minor benefit which is outweighed by the equities in favor of innocent creditors," [10] we cannot regard the benefit which would accrue to Mr. Gilpin should the assignment be approved as a minor one. We therefore must deny Austin's Petition for Extraordinary Relief.

6. Accordingly, IT IS ORDERED, That the request of the Chief, Broadcast Bureau, filed September 13, 1972, for leave to file a supplemental response IS GRANTED, and such supplemental response IS ACCEPTED.

7. IT IS FURTHER ORDERED, That the Petition for Extraordinary Relief filed by Henry P. Austin, Jr. on August 1, 1972, IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*

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[10] *Capital City Communications, Inc., supra.* See also *Second Thursday Corp.*, 22 FCC 2d 515 (1970).

F.C.C. 72R-345

BEFORE THE

FEDERAL COMMUNICATIONS COMMISSION

WASHINGTON, D.C. 20554

In Re Applications of WHCN, INC. (WHCN-FM), HARTFORD, CONN. For Renewal of License	Docket No. 18805 File No. BRH-24
KENNETH W. SASSO, W. FRANCIS PINGREE AND LAWRENCE H. BUCK, D.B.A. COMMUNICOM MEDIA, INC., BERLIN, CONN. For Construction Permits	Docket No. 18806 File No. BPH-6806

MEMORANDUM OPINION AND ORDER

(Adopted November 24, 1972; Released November 28, 1972)

BY THE REVIEW BOARD: BOARD MEMBER BERKEMEYER ABSENT.

1. WHCN, Inc. (WHCN), requests the Board to add a series of issues to this proceeding and to find good cause for the late filing of the petition to enlarge.[1] WHCN has established good cause for the late filing of its petition. The request for a legal qualifications issue against Communicom has been withdrawn by petitioner, and it will not be considered further.

2. An issue based on Communicom's failure to include all information called for by the application form (Section 1.514(a) of the Rules) will be added. Communicom's March, 1972 amendment, including the exhibits filed in April, does not adequately respond to the requirements of the form, for the reasons noted by petitioner and the Bureau. It is unnecessary for the Board to spell out these deficiencies. However, since Communicom is not represented by counsel and since the omissions appear to stem more from ignorance than an effort to conceal, the issue will be cast only in terms of the effect these deficiencies have on that applicant's comparative qualifications.

3. The Board agrees with the Broadcast Bureau's arguments for not adding ineptness and abuse of process issues against Communicom.

4. One of the owners of Communicom, Mr. Pingree, would appear to be in violation of the Commission's cross interest policy were he to continue to serve as a part-time announcer at WHNB-TV after a grant to Communicom. Therefore a cross interest issue will be added. However, were adequate assurances to be given that, in the event of a grant to Communicom, Mr. Pingree would discontinue employment with WHNB-TV prior to the issuance of a construction permit, the issue would be rendered moot.

[1] The pleadings under consideration are: (a) petition to enlarge issues, filed by WHCN, on May 9, 1972; (b) Broadcast Bureau's comments, filed May 31, 1972; (c) comment and request to dismiss, filed May 19, 1972, by Communicom Media; and (d) reply of WHCN, filed June 9, 1972.

5. The Section 1.65 issue requested by petitioner will be added; it is apparent from the pleadings that Communicom may not have kept the Commission promptly informed of significant personnel changes as they involved Mr. Pingree and Mr. Sasso. For the reasons noted in connection with the Rule 1.514 issue, the Rule 1.65 issue will also be limited to consideration of the effect non-compliance may have on Communicom's comparative qualifications.

6. Sufficient doubt exists as to the real party-in-interest in Communicom to warrant the addition of an issue. Mr. Hershfeld's interest in the applicant may well exceed that represented in the application, and Communicom has made no adequate response on this question to petitioner's allegations. A candor issue is also justified since the ambiguity of Mr. Hershfeld's role and other recent changes in the plan of financing of the applicant cast doubts on earlier assertions by Communicom that it had $24,000 on deposit.

7. Accordingly, IT IS ORDERED, That the issues herein ARE ENLARGED by the addition of the following:

(a) To determine whether Communicom Media, Inc., has failed to comply with the provisions of Sections 1.514(a) and 1.65 of the Commission's Rules, and, if so, the effect of such failure on that applicant's comparative qualifications.

(b) To determine whether a grant to Communicom Media, Inc., would violate the Commission's cross interest policy as it applies to the operation of FM and television stations serving substantially the same area.

(c) To determine whether the application of Communicom Media, Inc., and the amendments thereto have accurately reflected the real parties-in-interest in that application, and, if not, to determine who are the real parties-in-interest.

(d) To determine whether the principals of Communicom Media, Inc., or any of them, have made any false statements or misrepresentations or have been lacking in candor in their submissions to the Commission in connection with that application.

(e) To determine, in view of the facts ascertained under the three preceding issues, whether Communicom Media, Inc., possesses the qualifications to be a licensee of this Commission.

8. IT IS FURTHER ORDERED, That the burden of proceeding under issues (a) through (e) above SHALL BE upon WHCN and the burden of proof under all the above issues SHALL BE upon Communicom Media;

9. IT IS FURTHER ORDERED, That in all other respects the petition to enlarge issues, filed May 9, 1972, by WHCN, Inc., IS DENIED, and that the request to dismiss WHCN's petition, filed May 19, 1972, by Communicom Media, Inc., IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION,
BEN F. WAPLE, *Secretary.*